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IN THE

Supreme Court of the United States

October Term, 1964

No. 640

BEN B. BURROWS,

Petitioner,

vs.

WAGGONER CARR, the Attorney General of the State of Texas, THOMAS C. LYNCH, Attorney General of the State of California, and FORREST M. SMITH, ERNEST M. GROOS and T. C. FROST, Trustees of the Morrison Trust,

Respondents.

Petition for Writ of Certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio.

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WAGGONER CARR, the Attorney General of the State of Texas, THOMAS C. LYNCH, Attorney General of the State of California, and FORREST M. SMITH, ERNEST M. GROOS and T. C. FROST, Trustees of the Morrison Trust,

Respondents.

Petition for Writ of Certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio.

Petitioner prays for a Writ of Certiorari to review the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio which judgment was entered in this proceeding on November 13, 1963. In addition to Waggoner Carr, the Attorney General of the State of Texas, other respondents to this petition for writ of certiorari are Thomas C. Lynch, Attorney General of the State of California and Forrest M. Smith, Ernest M. Groos and T. C. Frost, Trustees of the Morrison Trust.

Citations to Opinions Below.

The Findings of Fact, Conclusions of Law and Declaratory Judgment of the District Court of the 131st Judicial District in Bexar County, Texas is unreported. It is reproduced in full in Appendix A hereto. (*Infra* at pages 1-21.) The Opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio is reported at 373 S. W. 2d 514 and is printed in full in Appendix A hereto. (*Infra* at pages 22-29.) Ben Burrows' Petition and Motion for Rehearing from the aforementioned decision of the Court of Civil Appeals was denied summarily without benefit of written opinion. Dr. Burrows' Petition for Writ of Error in the Supreme Court of Texas was denied without benefit of opinion. Petitioner's Motion for Rehearing in the Supreme Court of Texas was also denied summarily without benefit of written opinion.

Jurisdiction.

The opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio was issued and filed on November 13, 1963. The petitioner's Motion for Rehearing was denied December 18, 1963. Petitioner's Request for Writ of Error to the Supreme Court of the State of Texas was denied on March 18, 1964, and Motion for Rehearing of that Writ of Error was denied on July 15, 1964.

The jurisdiction of this court is invoked under 28 U. S. C. Section 1257, subsection 3 because a title, right, privilege or immunity was claimed under the Constitution of the United States, which claim was rejected by both the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas at San Antonio and the Supreme Court of the State of Texas.

Questions Presented.

1. Whether or not trust provisions establishing lawful clinic-hospitals in California may be held invalid on the ground the said provisions are contrary to Texas public policy when all operations of said hospitals are to be conducted in California.

2. Whether or not a chiropractor is denied his right of equal protection under the Federal and State Constitutions when he is precluded from acting as a consultant and doing research and study while other branches of the healing arts have these rights.

3. Whether or not the right of Texas to regulate the chiropractic profession is limited and whether regulations tending to defeat the existence of chiropractic are violative of the due process clause of the 14th Amendment.

Constitutional Provisions.

United States Constitution, Article IV, Section 1:

Full faith and credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State and the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved and the effect thereof.

United States Constitution, Amendment 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

The Last Will and Testament of R. W. Morrison, dated April 2, 1948 was duly probated in the State of Texas. That will provided for the establishment of a trust (which provisions are set forth in full in Appendix B hereof, *infra,* at pages 30-41) which contained certain provisions for the establishment of a series of clinic-hospitals. These hospitals were to be financed through the use of fifty percent of the income derived from the trust. This trust was to be administered in Texas and the properties from which the income was derived were also located in Texas. The first research clinic-hospital was to be located in California.

Except for the establishment of certain fiscal policies all of the responsibility for the control and administration of the clinic-hospitals was to be vested in a committee designated as the clinic-hospital committee. The clinic-hospital committee was to be composed of three individuals including the petitioner, Ben B. Burrows, all of whom were to be trained in the same art and science as practiced and advocated by Dr. Ben B. Burrows, a California licensed chiropractor.

The will provided that the clinic-hospitals "shall be devoted exclusively to the scientific study, research and improvement of existing methods, and to the development of new methods of treating and of preventing human sickness particularly with respect to the effects on human health of nutrition, blood chemistry, radionics and electricity, and to methods of non-medicinal healing, and to apply the knowledge so acquired in the treatment of human sickness."

The trial court held that the establishment and maintenance of such a clinic-hospital within the State of

Texas "would be in violation of the laws and public policy of the State of Texas and in particular the Medical Practice Act, the Chiropractic Act and Hospital Licensing Act of the State of Texas . . . and such clinic-hospital provisions of said testator's will are invalid in the State of Texas." The trial court went on to hold that "insofar as it authorizes the acts to be performed by such clinic-hospital committee in the State of California (the validity of the trust) is to be determined with reference to California law and not Texas law."

The Court of Civil Appeals held that the scientific study, research and improvement of existing methods of non-medicinal healing were so contrary to the public policy of the State of Texas that they would deny the trustees the right to put the clinic-hospitals into operation even outside of the State of Texas.

How the Federal Question Was Presented.

The petitioner made timely petition to the Supreme Court of the State of Texas asserting in the Petition for Writ of Error and Motion for Rehearing before that court, the applicability of the substantive due process and equal protection clauses of the 14th Amendment of the United States Constitution. Notwithstanding the allegation of the petitioner's application to the Supreme Court of Texas and his Petition for Rehearing the Supreme Court of that State denied the relief sought by the petitioner and the Judgment of the Court of Civil Appeals has now become final.

Petitioner introduced in evidence the Chiropractic Act of the State of California in the trial court and this was accepted by the trial Judge recognizing the validity

of such a clinic-hospital in the State of California. This was affirmed by the Court of Civil Appeals which recognized that a clinic-hospital would not be condemned in the foreign California jurisdiction. In opposition to the trial court however, the Court of Civil Appeals refused to give the full faith and credit to the California public act.

REASONS FOR GRANTING WRIT.

Trust Provisions Establishing Lawful Clinic-Hospitals in California May Not Be Held Invalid on the Ground That Said Provisions Are Contrary to Texas Public Policy When All Operations of Said Hospitals Are to Be Conducted in California.

There is no question that within certain limitations (see *infra*) the State of Texas has certain rights through the exercise of its police power to regulate certain acts and operations within its borders.

It is a well established rule, with which petitioner takes no issue, that the State of Texas may decline to recognize foreign legislation when such legislation is contrary to Texas public policy and when the recognition of such legislation would interfere with the right of Texas to regulate the health, morals and general welfare of its citizens. Petitioner contends that such right to refuse recognition is however limited by the United States Constitution, and that the Supreme Court of the United States is the final arbiter of the question whether a State may have a local policy meriting recognition as a permissible limitation on the full faith and credit clause. *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 80 L. Ed. 220, 56 S. Ct. 229.

The Morrison will provided for the establishment of certain clinic-hospitals and that a "hospital committee shall be the sole authority as to all clinic-hospital operations". (Appendix B, Para. 8.) That hospital committee was to be under the guidance of the petitioner, Burrows. The trustees of the trust were responsible only for the fiscal policies in the operation of the clinic-hospitals. The Texas Court of Civil Appeals conceded that the operations of such clinic-hospitals would "not be condemned as criminal in the foreign jurisdiction" (State of California) and this is affirmed by the brief of the Attorney General for the State of California set forth in full in Appendix C hereof (*infra* at pages 42-69) and the California Chiropractic Act set forth in full in Appendix D hereof (*infra* at pages 70-82) which Act was introduced into evidence.

The Court of Civil Appeals asserted that the public policy of the State of Texas would control the California operations and that because such policy was at variance to the stated policy of California, it would deprive the trust of the right to create such clinic-hospitals in the State of California. Petitioner respectfully submits that the public policy of the State of Texas can only control if the State of Texas health, morals and general welfare would be so seriously affected as to give the State of Texas a paramount interest.

It is true that the United States Constitution under the full faith and credit clause does not ordinarily require a State to substitute for its own law the conflicting law of another State. A rigid and literal enforcement of the full faith and credit clause would lead to the absurd result that whenever a conflict arises the statute of each State must be enforced in the courts of

another State but could not be enforced in its own courts. Because of the absurdity that might follow as a result of the arbitrary application of the clause the United States Supreme Court has recognized that

> "the test or controlling principle is that the interest of the forum and the other State must be weighed and balanced, with the full faith and credit clause to be given effect except where the interest of the forum is so strongly preponderant over the interests of the other State as not to require the subordination of the forum's laws to the laws of such other state." (16 Am. Jur. 2d 998, Constitutional Law, Sec. 591.)

An issue in this case is whether or not the determination of fiscal policies is by itself a sufficient interest through which the State of Texas can assert its laws over that of California and give extra-territorial effect to them. There is a multitude of cases where the United States Supreme Court has found that the governmental interests of the forum as compared with that of the situs is slight and consequently the forum is bound to give effect to the law of the foreign state in subordination of its own law or public policy. *New York Life Insurance Company v. Head* (1914), 234 U. S. 149, 58 L. Ed. 1259, 34 S. Ct. 879: *New York Life Insurance Company v. Dodge* (1918), 246 U. S. 357, 62 L. Ed. 772, 38 S. Ct. 337; *Aetna Life Insurance Company v. Dunken* (1924), 266 U. S. 389, 69 L. Ed. 342, 45 S. Ct. 129; *Bradford Electric Light Company v. Clapper* (1932), 286 U. S. 145, 76 L. Ed. 1026, 52 S. Ct 571, 82 A. L. R. 696; *Hartford Accident and Ind. Co. v. Delta and Pine Land Company* (1934), 292 U. S. 143, 78 L. Ed. 178, 54 S. Ct. 634,

92 A. L. R. 928; *John Hancock Mutual Life Insurance Company v. Yates* (1936), 299 U. S. 178, 81 L. Ed. 106, 57 S. Ct. 129; *Fidelity Phoenix Fire Insurance Company v. Cortez* (1937), 92 F. 2d 882;

The only effect on the State of Texas by enforcing the provisions of the Morrison trust with respect to the California clinic-hospitals would be that monies would be dispatched from the State of Texas to the State of California. There is no evidence that a clinic-hospital operated in California by Californians for Californians would have any direct or indirect effect on the State of Texas or its inhabitants.

The only apparent contact or interest which is offensive to the State of Texas is "we (Texas) will not have Texas land and personal property administered by Texas trustees under Texas law and the revenue sent to another State for a purpose which is criminal under laws although it is not condemned as criminal in the foreign jurisdiction." How or why it is "criminal" is left entirely to conjecture and not one word is stated to define or set forth the nature of the crime that is supposed to be committed in carrying out the testator's trust. Presumably there is nothing illegal about Texas personal property and land being administered by Texas trustees, which leaves only the issue of transfer of monies.

In *Broderick v. Rosner* (1935), 294 U. S. 629, 79 L. Ed. 1100, 55 S. Ct. 589, 100 A. L. R. 1133; the court reaffirmed that a State's power is subject to the

limitations imposed by the full faith and credit clause of the federal constitution. In that case, the New Jersey court of Errors and Appeals had affirmed a judgment in favor of defendants in an action to recover unpaid assessments against stockholders of a bank by the State Superintendent of banks of another State. The basic ground for the State courts decision was that New Jersey would not give recognition to a foreign statute imposing assessments on stockholders of banks as there was a specific New Jersey statute stating such liability to be contrary to the public policy of New Jersey. Like the case at bar, the defendant stockholders only act within the forum was that of transmitting monies and through their votes establishing policies of a corporation which would be active in another State. The United States Supreme Court held that such a contact with the forum was not a sufficient contact for the policies of the forum to override the policies of the foreign State.

It is respectfully submitted, on the authority of *Broderick v. Rosner, supra,* in accordance with the policies established by this court in the aforementioned cases, that this court recognize that the State of Texas does not have a sufficient interest in the California clinic-hospitals for Texas laws and policy to be controlling with respect to the performance of testator's intent.

A Chiropractor Is Denied His Right of Equal Protection Under the Federal and State Constitutions When He Is Precluded From Acting as a Consultant and Doing Research and Study While Other Branches of the Healing Arts Have These Rights.

Somewhat akin to the Federal Constitution, the Constitution of the State of Texas directing itself specifically to the area of medicine and the healing arts states that the "Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish persons for malpractice, but no preference shall ever be given by law to any school of medicine." (*Texas Constitution Article 16, Section 31*). Standing alone and by themselves, both the Constitutional provisions and the statutes of the State of Texas are not challenged by the petitioner. It is, however, contended that the actions of the judiciary in the trial and appellate courts have effectively denied to the petitioner his right to equal protection of the laws guaranteed him by Amendment 14 of the United States Constitution and the correlative rights guaranteed him by the Texas Constitution, *supra*. It is clear, that the Constitutional provision of denial of equal protection of the laws applies not only to legislation, but also to judicial or administrative action by the state. *Shelley v. Kraemer, et al.*, 334 U. S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, 3 A. L. R. 2d 441.

While a State may not deny the right of an accepted discipline to exist, the lower courts in the case at bar have placed in issue whether or not a State may discriminate between different classes and the members of the different classes within the healing arts professions.

As Mr. Justice Matthews in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. Ed. 220, 226, 6 S. Ct. 1064, speaking for both the due process and the equality clause of the 14th Amendment said:

> "These provisions are universal in their application . . . and the equal protection of the laws is a pledge of the protection of equal laws."
>
> "Immunity granted to a class, however limited, having the effect to deprive any class, however limited, of personal or property rights is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of a right permitted worked against, a larger class. . . . No impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and condition."
>
> *Truax v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 42 S. Ct. 124.

> "For, as before said, it (i.e. the equality clause) has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."
>
> *Missouri v. Lewis; Bowman v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 989.

There is an abundance of both state and Federal authority for the proposition that a State has the right to regulate the members of the healing arts professions.

Petitioner does not challenge this State right, nor does he challenge the established rule that a State may limit a practitioner in the scope of the practice of the healing arts profession. The issue is not raised now, nor was it raised in the record, that the practice of chiropractic is anything other than a limited practice within the general field of the healing arts professions.

The State of Texas has availed itself of its right to limit particular branches of the practice of medicine and specifically under *Article 4504, Vernon's Civil Statutes* and *Article 739 Vernon's Penal Code,* the Texas Legislature has declared it to be unlawful to practice medicine in any of its branches without a designated license to practice medicine. In the subsequent Code sections, *Article 740 Vernon's Penal Code; Article 4505 Vernon's Civil Statutes,* the Legislature specifically stated that "the provisions of this Chapter do not apply to dentists . . . nor to duly licensed chiropractors . . . nor to legally qualified physicians of other states called in consultation. . . ." In prosecution for practice of medicine without a license, authorization to engage in the practice of medicine under one of the statutory exceptions is a matter of defense. *Hawkins v. State* (1939), 136 Cr. R. 413, 125 S. W. 2d 580.

The State of Texas permits convalescent and nursing homes and related institutions to be conducted in accordance with certain standards. The Convalescent and Nursing Home Act (*Article 4442c Vernon's Civil Statutes*) however, in Section 2 of that Act, specifically states "nor shall this Act apply to institutions operated by persons licensed by the Texas State Board of Chiropractic Examiners."

The foregoing discussion indicates that the intent of the Texas State Legislature was to recognize the practice of chiropractic and provide within the State of Texas a set of rules under which this limited practice of a beneficial healing art could be conducted by duly licensed doctors of chiropractic. The Texas State Courts (*Moseley v. Texas and New Orleans Railroad Company,* 346 S. W. 2d 638) have stated in dicta that a railroad company furnishing medical and surgical treatment and services is not in violation of the Medical Practice Act. While the right of a lay entity to provide medical services is not in question before this Court, petitioner does, however, respectfully assert that once the State of Texas has recognized a branch of the nealing arts professions that State must, under the equal protection clause of the 14th Amendment of the United States Constitution grant to that discipline the same rights of self-improvement through study and research that it grants to other disciplines within the healing arts professions.

It would appear that a doctor of chiropractic who is legally qualified in his own State but does not maintain a place of practice in Texas should be given the same privilege as his other medical brethern to aid, where he can, in the furtherance of the health of the citizens of the United States, including the State of Texas. On this fact alone, it would appear to be a denial of equal protection of the laws to the petitioner, Burrows, to prohibit his consultative work performed at the request of Texas chiropractors.

The only additional fact to be considered in relation to the consultative work performed by Dr. Burrows is whether or not his capacity as general director of the

clinic-hospital program would take him out of the privileged class of consulting doctors. There is no question that the terms of the trust provided that it was the clinic-hospital that should research, that treatment be given by a duly licensed practitioner, and that Dr. Burrows would be nothing more nor less than the directing member of the administrative clinic-hospital committee. At no point within the trust instrument was Dr. Burrows personally required to perform treatment on any citizens of the State of Texas. In the case of *Liggett Co. v. Baldridge,* 278 U. S. 107, 73 L. Ed. 204, 49 S. Ct. 57, the Court was faced with the question of whether or not the ownership of drug stores could constitutionally be limited to those licensed to dispense drugs. The State legislation specifically precluded the appellant in that case from purchasing and owning drug stores when it was not licensed as a pharmacist. In rejecting the argument that such regulation was necessary for the public health and welfare of the citizens of the State of Pennsylvania the Court pointed out that the State of Pennsylvania had, through various statutes, regulated the practice of medicine, the prescription of remedies and the fact that a registered pharmacist must have charge of independent drug stores, etc. After noting that each particular act to which the public would be subjected was itself controlled by a separate statute, the Court concluded "thus it would seem every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding or selling drugs and medicines is amply safeguarded . . . a State cannot under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupa-

tions or impose unreasonable or unnecessary restrictions upon them." *Jay Burns Baking Co. v. Bryan,* 264 U. S. 504, 513. 68 L. Ed. 813, 826, 32 A. L. R. 661, 44 S. Ct. Rptr. 412. See also *Meyer v. Nebraska,* 262 U. S. 390, 399, 400, 67 L. Ed. 1043, 1045, 1046; 29 A. L. R. 1446, 43 S. Ct. Rptr. 625; *Norfolk & W. R. Co. v. Public Serv. Commission,* 265 U. S. 70, 74, 68 L. Ed. 904, 907, 44 S. Ct. Rptr. 439; *Pierce v. Society of Sisters,* 268 U. S. 510, 534, 535, 68 L. Ed. 1070, 1077, 1078, 39 A. L. R. 468, 45 S. Ct. Rptr. 571; *Weaver v. Palmer Bros. Co.,* 270 U. S. 403, 412-415, 70 L. Ed. 654, 657-659, 46 S. Ct. Rptr. 320; *Fairmont Creamery Co. v. Minnesota,* 27 U. S. 1, 9-11, 71 L. Ed. 893, 897, 52 A. L. R. 163, 47 S. Ct. Rptr. 506.

The establishment by the Morrison Trust under the direction of Dr. Burrows of a series of clinic-hospitals in California by and of itself does not affect the public health of Texas. It is only in the prescription, diagnosis and treatment of the patients which might call upon the facilities of said clinic-hospitals in Texas that there would, in fact, be any effect on the health and welfare of Texans. Texas has seen fit through enactment of the Texas Chiropractic Act and its Medical Practice Act along with its Hospital and Rest Home regulations to clearly protect the public health and welfare at each and every point where the public would be affected by the establishment of said clinic-hospitals. So has California. It has been stated that much of the clinic-hospitals' activities, as set forth in the Morrison will, could not be accomplished in the State of Texas without the supervision of a licensed medical doctor in the State of Texas. There is not a single provision in the Morrison will to preclude the hiring of such a phy-

sician. The only duties imposed upon Dr. Burrows are analogous to the duties imposed or asserted by the Liggett Co. in *Liggett Co. v. Baldridge, supra,* namely, general policy determination and supervision of the overall plan of the proposed venture.

It is respectfully urged that this court sustain the petitioner in his contention that to deny him the right of research, study and consultation is to deny him equal protection under the 14th Amendment when other healing arts professions have these self-same rights of self-improvement.

The Right of Texas to Regulate the Chiropractic Profession Is Limited and Regulations Tending to Defeat the Existence of Chiropractic Are Violative of the Due Process Clause of the Fourteenth Amendment.

It is well established that the State of Texas has the right to regulate activities within its borders which affect the public health, safety, welfare and morals. The practice of medicine is no exception to this and "in its most general sense has long been the subject of regulation." *McNaughton v. Johnson* (1917), 242 U. S. 344, 349, 61 L. Ed. 352, 37 S. Ct. 178.

While a State has always had the right to limited regulation of activities within its borders, it has never had the right to unlimited regulation. The means employed to affect its exercise can be neither arbitrary nor oppressing, but must bear a real and substantial relation to an end which is to be, specifically, public health, public safety, or public morals, or some other phase of the general welfare. *Treigle v. Acme Home State Association* (1936), 297 U. S. 189, 196, 80 L.

Ed. 575, 56 S. Ct. 408; *Liggett Co. v. Baldridge,* 278 U. S. 107, 73 L. Ed. 204, 49 S. Ct. 57.

There is no question that a State "is not bound to recognize every peculiar theory or school of medicine but it cannot deny to any individual the right to exercise a reasonable choice in the method of treatment of his ills, nor can it deny the correlative right of practitioners to engage in the practice of a useful profession." *England v. Board of Medical Examiners,* 259 F. 2d 626, rehearing denied 263 F. 2d 661 certiorari denied 359 U. S. 1012, 3 L. Ed. 1036, 79 S. Ct. 1149. In the *England* case the court stated that a state would be exceeding its police power if it were to outlaw an apparently useful and beneficent profession such as chiropractic without a reasonable showing or proof of a rational basis for doing so.

A principle issue facing this court is whether or not the State of Texas in its regulation of the chiropractic profession has so arbitrarily limited the practice of chiropractic as to sound the death knell of the profession and hence deprive that profession of due process of law under the 14th Amendment of the United States Constitution.

Since the birth of civilization men have disagreed as to the manner in which ills should be treated. It was and is self-evident that no one discipline in the healing arts professions had all of the answers to all of the physical problems of man. Today each State, including Texas, recognizes that each of the many disciplines of the healing arts professions contribute through their particular science and study to the better health of man. *Texas Medical Act, Vernon's Civil Statutes,*

Article 4495, et seq.; Texas Chiropractic Act, Vernon's Civil Statutes, Article 4512, et seq.; Texas Chiropody Act, Vernon's Civil Statutes, Article 4567, et seq. To single out for abolition any particular discipline has been held violative of the due process clause (see *supra*).

The Morrison will and incorporated trust provided for funds through which the chiropractic profession, both in Texas and in other states, could do study and research into the techniques and procedures which would aid it to better serve man. It is self-evident that chiropractic as a living science, like other sciences, must continually question its own principles and procedures and do research and study to heighten the perfection of its techniques and procedures. By questioning and research the medical and research laboratories of this nation have developed untold vaccines, treatments and medical operative procedures which have enabled the science of medicine to move forward. To have denied the Pasteurs, Salks and the Curies the right of research would have dictated that the science of medicine remain in the domain of supersitition, black magic and the witch doctor. To deny any discipline the right to research is to deny it the right to advance. To deny science the right to advance is to deny it its very existence and this a State cannot do. (See *supra*).

It is respectfully submitted that the Courts of Texas in depriving a member of the chiropractic profession of the right to more fully understand his art has violated the due process clause of the 14th Amendment of the United States Constitution.

Conclusion.

It is respectfully submitted that this Petition for Writ of Certiorari should be granted for the foregoing reasons.

Dated: October 9, 1964.

C. P. VON HERZEN,
Counsel for the Petitioner.

STAHL & SOHN,
Of Counsel.

APPENDIX "A".

Declaratory Judgment.

In the District Court, 131st Judicial Dis: ict, Bexar County, Texas.

Forrest M. Smith, et al. vs. Ben B. Burrows, et al. No. F-116,186.

On the 26th day of June 1961 came on to be heard the above entitled and numbered cause after having been regularly set and called for trial, wherein FORREST M. SMITH, ERNEST M. GROOS and T. C. FROST, TRUSTEES OF THE MORRISON TRUST, are plaintiffs, and BEN B. BURROWS, EDMUND G. BROWN, Attorney General of the State of California; WILL WILSON, Attorney General of the State of Texas; FRED M. STANDLEY, Attorney General of the State of New Mexico, and BAYLOR UNIVERSITY, a Texas corporation, are the defendants; and it appearing to the Court that all of said defendants have been personally cited to appear and answer herein in the manner and form provided by law; and it further appearing to the Court that Baylor University has filed a waiver and disclaimer of any interests in the subject matter of this suit; that Fred M. Standley, Attorney General of the State of New Mexico, though duly cited to appear and answer herein came not but wholly made default, and that all of the other defendants have filed answers herein; and the Court having jurisdiction of the parties and of the subject matter of this suit, and the plaintiffs announced ready for trial, and the defendants, Ben B. Burrows, and Will Wilson, Attorney General of the State of Texas, announced ready for trial by and through their respective attorneys of record, and the remaining defendants,

though duly notified of the setting of this case, failed to appear either in person or through their attorneys; and a jury having been waived, the cause proceeded to trial before the Court. And after hearing the pleadings read and the evidence, the Court requested the parties, plaintiffs and defendants, through counsel, to submit written briefs for consideration of the Court, and that after the filing of such briefs, the matter would be set for oral argument on the briefs; that thereafter on the 26th day of February 1962 the Court heard oral arguments by attorneys for the plaintiffs and by the attorneys for the defendants, Ben B. Burrows and Will Wilson, Attorney General of the State of Texas; and the Court, after considering all matters involved, announced the following findings of fact and conclusions of law and rendered judgment accordingly.

I

The Court finds as a fact that the last will and testament of R. W. Morrison, dated April 2, 1948, was duly probated in Bexar County, Texas, on the 27th day of April 1948; that said will was a joint will of R. W. Morrison and Louise L. Morrison; that Louise L. Morrison, the surviving widow of the testator, R. W. Morrison, elected not to take the benefits provided for her under said joint will but in lieu thereof elected to take her one-half of the community property, the same being one-half of the community estate accumulated during her marriage with the testator, R. W. Morrison; that her election heretofore has been adjudicated to have been a valid election, in Cause No. 64,372, Estate of R. W. Morrison, by judgment entered in the County Court of Bexar County, Texas, sitting in matters probate, on July 10, 1953.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that Louise L. Morrison, the surviving widow of R. W. Morrison, deceased, validly exercised her right not to take under the joint will of herself and her deceased husband, R. W. Morrison, dated April 2, 1948, and in lieu thereof validly claimed and received her one-half of the net community estate accumulated during her marriage with R. W. Morrison, and that such election to claim her one-half of such community estate in lieu of the benefits provided for her under such joint will is valid and binding upon all parties to this suit, and said County Court judgment is res adjudicata of all issues there involved and such judgment cannot be collaterally attacked in this proceeding.

II

The Court further finds as a fact:

(a) That it was the intention of the testator, R. W. Morrison, in making provisions for the establishment, maintenance, and operation of the clinic-hospitals and the operation thereof by the clinic-hospital committee that the entire community estate of himself and his said wife, Louise L. Morrison, would constitute the corpus of the Morrison Trust as set forth in his said will.

(b) That by reason of the election of Louise L. Morrison not to take the benefits provided for her by said will and to take in lieu thereof her one-half of the net community estate, reduced by approximately 50% the corpus of the Morrison Trust and the contemplated net income available for the establishment, maintenance and operation of said clinic-hospitals.

(c) That the Board of Trustees of the Morrison Trust shall have the right, power and prerogative to accumlate income of the Morrison Trust attributable to the clinic-hospital provisions thereof until such time as they, in their sole judgment and discretion, deem sufficient funds to be available to establish, maintain and operate the first and subsequent clinic-hospitals.

(d) That the Board of Trustees in the exercise of their powers and duties to establish the first and subsequent clinic-hospitals may properly reduce the size of such clinic-hospitals and the salaries of the members of the clinic-hospital committee as they deem proper under all of the facts and circumstances relating to the trust, including, but not exclusive of, the reduced size of the corpus of the Morrison Trust and the income therefrom allocable to the clinic-hospital provisions thereof and consistent with prudent management of a perpetual trust, provided, however, clinic-hospital committee members' salaries shall not be inconsistent with Paragraph 12 of Section IV of this judgment.

(e) That the provisions for the salaries of the clinic-hospital committee is precatory and not binding on the Board of Trustees, except as provided for in Paragraph 12, Section IV, of this judgment.

(f) That all the powers and duties conferred by said will on the Board of Trustees are discretionary in character and are non-delegable.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court:

(a) That it was the intention of the testator, R. W. Morrison, in making provisions for the establishment, maintenance and operation of the clinic-hospitals and

the operations thereof by the clinic-hospital committee that the entire community estate of himself and his said wife, Louise L. Morrison, would constitute the corpus of the Morrison Trust as set forth in his said will; that the election of Louise L. Morrison not to take the benefits provided for her by said will but to take in lieu thereof her one-half of the net community estate, thereby reduced by approximately 50% of the corpus of the trust and the contemplated net income available for the establishment, maintenance and operation of said clinic-hospitals.

(b) That it is the right, power and prerogative of the Board of Trustees of the Morrison Trust in the exercise of their discretionary powers to accumulate income attributable to the clinic-hospital provisions of said will until such time as they, in their sole judgment and discretion, deem sufficient funds to be available to establish, maintain and operate the first and any subsequent clinic-hospitals.

(c) That the Board of Trustees, in the exercise of their powers and duties to establish the first and subsequent clinic-hospitals, may properly reduce the size of such clinic-hospitals and the salaries of the members of the clinic-hospital committee as they deem proper under all of the facts and circumstances relating to the trust, including, but not exclusive of, the reduced size of said trust and consistent with prudent management of the fiscal affairs of a perpetual trust, provided, however, the clinic-hospital committee members' salaries shall be consistent with Paragraph 12 of Section IV of this judgment.

(d) The provision in the will specifying the salaries to be paid to the members of the clinic-hospital com-

mittee is precatory and not binding upon the Board of Trustees, subject, however, to the provisions in (c) next above.

(e) All powers and duties conferred on the Board of Trustees by the will are discretionary in character and cannot be delegated or be exercised by the court.

(f) That the Morrison Trust and the clinic-hospital provisions of the will do not fail because the corpus of the trust has been reduced to substantially one-half of that which was originally intended by the testator by reason of the election of the testator's surviving spouse to claim her one-half of the community estate in lieu of the benefits provided for her under such will.

III

The Court further finds as a fact:

(a) That the testator, R. W. Morrison, at the time of his death on April 3, 1948, was a resident of and domiciled in the State of Texas; that it was the intention of the testator that his will and estate be probated and administered in the State of Texas, which was done; and that a Board of Trustees, who are always to be domiciled in Texas, are to continuously administer the Morrison Trust in Bexar County, Texas.

(b) That the testator left the entire residue of his estate to an educational, charitable and scientific trust, to be known as the "Morrison Trust." The corpus of such trust is composed, principally, of real estate situated in Bexar County, Texas, certain United States Government bonds, secured real estate notes and cash, all of which are physically located in Bexar County, Texas.

(c) That it was the intention of the testator that the Morrison Trust be continuously administered as a single

trust, with the corpus and the income handled together as a single fund, and the net income therefrom each year to be credited 50% to clinic-hospitals, 25% to Baylor University for the purposes stated in the will, and 25% to a fund for perpetuation and preservation of the property of the trust estate and for replacements and improvements. The continuous administration of the Morrison Trust was intended by the testator to be at all times in the State of Texas and not elsewhere.

(d) That the express intention of the testator was for the Trustees of the Morrison Trust, immediately upon the vesting of the trust estate in said trustees and their taking possession thereof, to cause books and records to be opened under the supervision of an established certified public accountant, and to thereafter cause the same to be continuously maintained, so that they will at all times truly reflect the condition, character and status of the corpus of the trust estate and income therefrom, the appropriation and expenditure of income and all financial transactions affecting or pertaining to said trust estate and its operations.

(e) That it was the intention of the testator that the Board of Trustees each year when the net income of the trust, from whatever source, for such year is determined allocate on the books of the trust 50% to the clinic-hospitals, 25% to Baylor University, and 25% to the fund for preservation and maintenance of the physical properties of the trust; that income not distributed each year shall be invested and handled along with other funds of the trust as a single fund as the trustees, in the exercise of their discretion and judgment, deem in the best interest of the trust, and all income shall accrue to the benefit of the entire trust.

(f) That said trustees, in their discretion, may amortize the premiums or losses on bonds or other obligations out of interest received thereon, should they determine such method to be in the best interest of the trust.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECEED by the Court:

(a) That the domicile of the testator, R. W. Morrison, at the time of his death was in Bexar County, Texas; that the last will of R. W. Morrison was probated in Bexar County, Texas, and his estate was administered in Bexar County, Texas; that all of the assets of the Morrison Trust are situated and have their situs within the State of Texas, and all of the Trustees of the Morrison Trust are, and are to be, residents of the State of Texas.

(b) That the Morrison Trust is to be continuously administered and treated as one trust, with the corpus and income handled together and treated as a single fund, and the entire net income therefrom each year, after payment of the annuities specified in said will, shall be credited on the books of the trust by the Trustees as follows: 50% to the clinic-hospitals account or fund; 25% to Baylor University, and 25% to the fund for perpetuation, preservation and maintenance of the physical properties of the trust as in said will provided; that income not distributed each year shall be invested and handled along with other funds of the trust as a single fund, as the Trustees, in the exercise of their discretion and judgment, deem in the best interest of the trust, and all income shall accrue to the benefit of the entire trust.

(c) That it was the intention of the testator that the Trustees of the Morrison Trust at all times administer said trust within the State of Texas and not elsewhere; that the same is now being administered wholly within the State of Texas, and that the income from said trust be used for the purposes as stated and directed in said will; that the corpus of the Morrison Trust shall remain in Texas and be at all times administered by the Board of Trustees of the Morrison Trust within the State of Texas and not elsewhere, and the same will be at all times subject to the jurisdiction of the courts of the State of Texas.

(d) That the Trustees, under the general terms and provisions of the trust, are authorized and empowered in their discretion to amortize premiums and losses on bonds or similar obligations out of interest received therefrom.

IV

The Court further finds as a fact:

(a) That it was the express as well as the implied intention of the testator, R. W. Morrison, that the Board of Trustees of the Morrison Trust were to have complete and continuing control of all of the fiscal affairs of the Morrison Trust, including all fiscal affairs and fiscal policies pertaining to the clinic-hospitals.

(b) That the testator intended that the Board of Trustees have and exercise all and every power under the Morrison Trust, including every power implied and incidental to the powers expressly enumerated, excepting only the function of operating the clinic-hospitals, which function was given exclusively to the clinic-hospital committee. The operation of the clinic-hospitals by the

clinic-hospital committee does not include the fiscal affairs or fiscal policies of the clinic-hospitals, which affairs shall always be vested in the Board of Trustees, except as directed by further orders of this court.

(c) That included within the express and implied duties and powers of the Board of Trustees of the Morrison Trust in regard to the clinic-hospitals (except as directed by further orders of this court) are:

(1) To determine the amount of the clinic-hospital reserve account to be expended in the establishment of the first clinic-hospital and the amount to be expended in the establishment of any subsequent clinic-hospital.

(2) To determine when and how much of the income of the clinic-hospital reserve account shall be expended each year on the first clinic-hospital once it has come into existence and is operating.

(3) To determine when and in what manner the first and each subsequent clinic-hospital shall be established and maintained.

(4) To select the site of each clinic-hospital after consultation with the chairman of the clinic-hospital committee and such other experts and authorities as the Trustees deem proper.

(5) To erect and construct clinic-hospitals and to do and perform all acts and things incident thereto.

(6) To lease and improve property for such purposes.

(7) To determine the size and character of the improvements after consultation with the chairman of the clinic-hospital committee and such other experts and authorities as the Trustees deem proper.

(8) To supervise the construction thereof.

(9) To do any and all things in bringing about the establishment and maintenance of the clinic-hospitals as they, in the exercise of their sound judgment deem prudent under all of the facts and circumstances relating to said trust, including, but not exclusive of, the amount of funds available for such purposes.

(10) To set up reserve accounts on the books of the Morrison Trust for future expenditures of the clinic-hospitals, once they are established and come into existence, and to create an operating fund to meet current expenditures with respect thereto and to establish and set up budgets covering such operations, giving due consideration to the budget first submitted by the clinic-hospital committee.

(11) To invest any funds in the clinic-hospital reserve account along with other funds of the trust in lieu of holding such reserve in cash.

(12) To determine and fix the amount of salaries to be payable to such clinic-hospital committee members as the Board of Trustees, in the exercise of their sound judgment in the management of the trust and its fiscal affairs, deem it proper and advisable to pay, and to contract with the members of the clinic-hospital committee in respect to the compensation they will be paid for their services in the operation of such clinic-hospitals, provided that such salaries shall be in accordance with the Morrison Trust reduced by one-half (½).

(d) That it was the intention of the testator that the Board of Trustees should have the broadest discretion in determining the size and character of the first clinic-hospital, and each subsequent one, within the general

plan of the testator that the first clinic-hospital shall be small and any subsequent clinic-hospital shall be larger, but this discretion shall not be exercised arbitrarily, it being the purpose and intent hereof that the Trustees make such clinic-hospitals practicable and functional.

(e) That the provision in the testator's will for the establishment of the second clinic-hospital in not less than two years from the date of the establishment of the first clinic-hospital is precatory and not binding on the Trustees, this decision being left to the sound discretion and judgment of the Trustees after considering all facts and circumstances pertaining to this trust and, in particular, the income therefrom.

(f) That the foregoing powers, duties and prerogatives of the Trustees are discretionary in character and are vested solely in the Trustees and cannot be delegated. That after the exercise of sound judgment and discretion by the Board of Trustees, they may then delegate to others acts which are mechanical or ministerial in character.

(g) The Board of Trustees, in the exercise of their duties as Trustees, will not be liable for any act performed in good faith or as the result of bad judgment.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court:

(a) That the Board of Trustees shall have every express, implied and incidental power over the management and operation of the Morrison Trust and its activites, including the clinic-hospital provisions thereof, excepting only that the members of the clinic-hospital committee shall be the sole authority as to all clinic-hospital operations, exclusive of the fiscal policies and

affairs of said clinic-hospitals, the control of which are vested in the Board of Trustees.

(b) All fiscal affairs of the Morrison Trust, including all fiscal affairs and policies of the clinic-hospitals, are to be continuously handled and managed by the Board of Trustees in the exercise of said Board's discretionary duties, and any income of or expenditures for the clinic-hospitals are to be under the direct control of the Board of Trustees, except as directed by further orders of this court.

(c) That the Board of Trustees shall have sole authority as to all matters pertaining or incident to the establishment and maintenance of the clinic-hospitals.

(d) That the provisions of the will for the establishment of a second clinic-hospital in not less than two years from the date of the establishment of the first clinic-hospital is precatory in nature and not binding on the Board of Trustees.

(e) That the powers, duties and prerogatives of the Board of Trustees in regard to the Morrison Trust and the clinic-hospitals are discretionary in character and cannot be delegated, except that after the exercise of sound judgment and discretion acts which are mechanical or ministerial in character may be delegated. In the exercise of these powers and duties by the Board of Trustees they will not be liable for any act performed in good faith or as a result of bad judgment.

V

The Court further finds as a fact:

(a) That it was the express intention of the testator that the first clinic-hospital should be established, maintained and operated in the State of California.

(b) That a clinic-hospital committee shall be formed by the Trustees to direct and operate the clinic-hospitals. Such committee shall be composed of Dr. Ben B. Burrows as directing member and two other members who shall be selected by the Board of Trustees from five names to be recommended and submitted by Dr. Ben B. Burrows.

(c) That the Board of Trustees shall name such clinic-hospital committee at any time before the first clinic-hospital commences to be built or operated, and shall fix the date upon which salaries of the committee members shall commence. The trustees in the establishment of the first and each subsequent clinic-hospital may consult with Dr. Ben B. Burrows or other committee members when the committee has been formed with regard to technical matters relating to such clinic-hospitals and with such other technical advisors as said Trustees deem advisable.

(d) That each directing committee member or committee member successor must be trained in the same arts and science as practiced and advocated by Dr. Ben B. Burrows and in the opinion of said Board of Trustees must be a man of high character and worthy of the position.

(e) That Dr. Ben B. Burrows is a chiropractor, holding a chiropractic license in the States of California and Michigan but not in the State of Texas or elsewhere. Research and study is being made by Dr. Burrows of the effects of nutrition, blood chemistry and physical therapy as applied to human health and disease. The art and science advocated and practiced by Dr. Ben B. Burrows are in the field of chiropractic as defined by the Chiropractic Law of the State of California.

Dr. Ben B. Burrows does not have a license to practice medicine in any State and has not attended or was not graduated from a medical school which authorizes its graduates to practice medicine as defined by the Medical Practice Act of the State of Texas. The directing member and other members of the committee and those who shall assist the committee shall be licensed chiropractors and shall be licensed to practice chiropractic in the State of California. It was the intention of the testator that the treatment of human beings by the persons mentioned in this Finding (e) not be limited to the treatment of the human spine.

(f) That Dr. Ben B. Burrows shall be the directing member of the hospital committee and shall devote at least one-half (½) of his time and attention to the clinic-hospital operations. The other members of the committee shall devote not less than one-half (½) of their entire time and attention to the clinic-hospital operations.

(g) That the clinic-hospital operations shall be under the sole authority of the clinic-hospital committee, excluding the fiscal affairs and fiscal policies of the clinic-hospitals which shall at all times be under the control of the Board of Trustees.

(h) Reasonable charges for services rendered by said clinic-hospitals shall be made to all who may avail themselves thereof and who may be financially able to pay therefore, but no needy person shall ever be denied services solely by reason of inability to pay therefor and all payments received for such services shall be paid to the committee operating the clinic-hospital and shall be used solely by them for the purposes of such

clinic, consistent with the fiscal policies set and established by the Board of Trustees.

(i) Should said hospital committee fail or refuse to operate any clinic-hospital in full accordance with the directions contained in the Morrison Trust and in accordance with the fiscal policies of the Board of Trustees, and to properly account for all receipts coming into their hands and all disbursements therefrom, said Trustees shall remove each member of said committee so failing or refusing and shall select and appoint their successor. A certified public accountant, selected by the Trustees, shall audit the books and records of the clinic-hospitals at least annually.

(j) That the clinic-hospital committee in pursuance of the operations of the clinic-hospitals shall be authorized to employ within the fiscal policies established by the Board of Trustees subordinate personnel to aid in the operation of such clinic-hospitals.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the court:

(a) That Dr. Ben B. Burrows shall submit the names of five chiropractors to the Board of Trustees from which said Trustees shall select two members of the clinic-hospital committee who must be trained in the same arts and science as practiced and advocated by the said Dr. Ben B. Burrows.

(b) That said Board of Trustees shall select such committee at any time they shall determine before the operation of the first clinic-hospital is commenced and shall fix the date upon which the salaries of committee members shall commence, and they shall, as they so elect, advise and counsel with Dr. Ben B. Burrows or other members of such committee and with anyone else

whom they desire with respect to the planning and other technical aspects of such clinic-hospitals.

(c) That members of the clinic-hospital committee must be licensed chiropractors in the State of California, trained in nutrition, blood chemistry, and physical therapy, with the remainder of their qualifications to be determined by the Board of Trustees and selected by said Trustees from a list of five names submitted to them by Dr. Ben B. Burrows.

(d) That Dr. Ben B. Burrows as directing member of the clinic-hospital committee and the other two members of said committee shall devote not less than one-half (½) of their entire time and attention to the clinic-hospital operations.

(e) That the clinic-hospital committee shall be the sole authority as to all clinic-hospital operations exclusive of fiscal policies pertaining to such clinic-hospitals, which policies shall be fixed by the Board of Trustees.

(f) That the clinic-hospital committee's dutues are not limited to directing the clinic-hospitals, but shall include research and work in the fields of nutrition, blood chemistry, radionics, physical therapy, and electricity and other methods of non-medicinal healing and to applying the knowledge so acquired in these fields in the treatment of human sickness in said clinic-hospitals. The testator never intended the operations of the clinic-hospitals to be by medical doctors acting under the direction of the clinic-hospital committee but that such operations were to be performed by the clinic-hospital committee, composed of licensed chiropractors and by other chiropractors subordinate to the committee, provided, however, that in the operation of the clinic-

hospitals, the clinic-hospital committee shall have the right to avail themselves of such technical and diagnostic assistance other than from medical doctors as is permitted by the laws of California and shall have the further right to refer patients to medical doctors who shall not be in the employ of the clinic-hospital when they deem it advisable.

(g) That the clinic-hospital committee shall make reasonable charges for services rendered by said clinic-hospitals if they are able to pay, but no person shall be denied services solely by reason of inability to pay therefor.

(h) That the provisions of the Morrison Trust for the treatment of the patients by the clinic-hospital committee and the provision for making reasonable charges for services rendered by said clinic-hospitals where patients are able to pay and the provisions for charity patients as provided for in Section IV(c)(7) of the Morrison Trust are both essential parts of the clinic-hospital trust provisions and are incapable of being separated from research, study or any other purposes of the trust.

(i) That the clinic-hospital committee in pursuance of the operations of the clinic-hospitals shall be, and they are hereby, authorized to employ, within the fiscal policies established by the Board of Trustees, subordinate employees to aid and assist in the operation of the clinic-hospitals. Any one employed by the committee, except licensed nurses, to administer to human beings shall be a licensed chiropractor who advocates and practices the same art and science as advocated and practiced by Dr. Ben B. Burrows.

(j) That the clinic-hospital committee, to be composed of chiropractors licensed in the State of California and trained in the same art and science as that practiced and advocated by Dr. Ben B. Burrows, the directing committee member, if doing research and study and applying the methods of nutrition, blood chemistry, physical therapy, radionics, electricity and other methods of non-medicinal healing in the treatment of human illness in a clinic-hospital established in the State of Texas, would be in violation of the laws and public policy of the State of Texas and in particular the Medical Practice Act, the Chiropractic Act and Hospital Licensing Act of the State of Texas, and it is the judgment of this court that the establishment, maintenance and operation of such a clinic-hospital in the State of Texas in the manner set forth in the testator's will would be violative of the laws and public policy of the State of Texas and such clinic-hospital provisions of said testator's will are invalid in the State of Texas.

(k) That the validity of the clinic-hospital provisions of the trust insofar as it authorizes the acts to be performed by such clinic-hospital committee in the State of California is to be determined with reference to California law and not Texas law. That the above acts to be performed by such clinic-hospital committee would not be in violation of the laws or the public policy of the State of California, and, therefore, the Board of Trustees are authorized to carry out the clinic-hospital provisions of the Morrison Trust in the State of California as expeditiously as said Trustees may reasonably in their judgment do so.

(l) That the Board of Trustees of the Morrison Trust are empowered to remove any member of the

clinic-hospital committee for failing or refusing to operate the clinic-hospitals as provided for in the testator's will as herein construed and interpreted.

VI

The Court further finds as a fact:

(a) That Dr. Ben B. Burrows is not a beneficiary under the will of R. W. Morrison, deceased.

(b) That the Attorney General of the State of Texas is the only person authorized to represent the State of Texas and the general public of the State of Texas.

(c) That the attorneys for the defendant, Dr. Ben B. Burrows, are not entitled to any attorneys' fees payable out of the clinic-hospital reserve account of the Morrison Trust.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court:

(a) That the request and prayer of the defendant, Dr. Ben B. Burrows, and his attorneys of record for attorneys' fees for services rendered herein be, and the same is hereby, denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that all costs and other expenses incident to this suit be adjudged against the plaintiffs, which shall be payable out of the clinic-hospital reserve account of such trust.

IT IS FURTHER ORDERED by the Court that by this judgment the laws of the State of New Mexico were not presented or passed upon by the Court.

The defendant, Will Wilson, Attorney General of the State of Texas, duly excepted to that portion of the

judgment found in Paragraph (k), Section V, on page 16, wherein the Court sustained the validity of the trust insofar as it authorizes the establishment of the first clinic-hospital in the State of California and the acts to be performed by such clinic-hospital committee in California, and in holding that the yalidity of said trust and the acts to be performed by such clinic-hospital committee is to be determined by reference to California law and not Texas law, and gave notice of appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District.

The defendant, Ben B. Burrows, likewise duly excepted to the judgment and gave notice of appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District.

SIGNED this day of November 1962.

Judge Presiding

Approved as to Form:
Dodson, Duke & Branch
1900 Tower Life Bldg
San Antonio, Texas
By
Attorneys for Plaintiff

A. R. Sohn and C. P. Von Herzen
National Bank of Commerce Bldg
San Antonio, Texas
By
Attorneys for defendant,
Ben B. Burrows

Will Wilson, Attorney General of Texas
By

Opinion

Will Wilson, Attorney General of the State of Texas, et al., Appellants, v. Forrest M. Smith et al., Appellees. No. 14148. Appeal from Bexar County.

This suit was brought in the District Court of Bexar County, Texas, by Petitioners Forrest M. Smith, Ernest M. Groos and T. C. Frost, Trustees of the Morrison Trust created under the will of R. W. Morrison, deceased, for a declaratory judgment construing the will of R. W. Morrison and setting forth their duties under the will.

Ben B. Burrows of Los Angeles, California, a chiropractor holding a chiropractic license in California, Edmund G. Brown, then Attorney General of the State of California, Will Wilson, then Attorney General of the State of Texas, Fred M. Standley, then Attorney General of the State of New Mexico, and Baylor University, Waco, Texas, were named defendants. Baylor University disclaimed any interest in the 50% of the income from the Morrison Trust to be donated to the establishment and maintenance of Clinic-Hospitals in California and elsewhere. The Attorney General of the State of New Mexico did not answer but defaulted.

The Attorney General of Texas answered that the establishment and operation of a clinic-hospital in Texas as provided and for the purposes stated in the Morrison will is prohibited by and contrary to the law and policy of the State of Texas, therefore such provisions are invalid and, being invalid, are void everywhere, and cannot be enforced as to the establishment and operation of such clinic-hospital in California, New Mexico, or elsewhere.

The case was tried before the court without a jury, and the trial court entered judgment, making many findings of fact and giving many instructions as to the duties of the trustees of the Morrison Trust, and members of the clinic-hospital committee yet to be appointed. This appeal has been perfected by Hon. Waggoner Carr, now Attorney General of the State of Texas.

The trial court, among other things, decreed as follows:

> "That the clinic-hospital committee, to be composed of chiropractors licensed in the State of California and trained in the same art and science as that practiced and advocated by Dr. Ben B. Burrows, the directing committee member, if doing research and study and applying the methods of nutrition, blood chemistry, physical therapy, radionics, electricity and other methods of non-medicinal healing in the treatment of human illness in a clinic-hospital established in the State of Texas, would be in violation of the laws and public policy of the State of Texas and in particular the Medical Practice Act, the Chiropractic Act and Hospital Licensing Act of the State of Texas, and it is the judgment of this court that the establishment, maintenance and operation of such a clinic-hospital in the State of Texas in the manner set forth in the testator's will would be violative of the laws and public policy of the State of Texas and such clinic-hospital provisions of said testator's will are invalid in the State of Texas."

We agree with this provision of the trial court's judgment as it is fully supported by the undisputed facts. The Morrison will provided, among other things, that:

"5. Said Clinic-Hospitals shall be devoted exclusively to the scientific study, research and improvement of existing methods, and to the development of new methods of treating and of preventing human sickness, particularly with respect to the effects on human health of nutrition, blood chemistry, radionics and electricity, and to methods of non-medicinal healing, and to applying the knowledge so acquired in the treatment of human sickness.

"6. Should said committee fail or refuse to operate any Clinic-Hospital herein provided for in full accordance with the directions contained herein, or to properly account for all receipts coming into their hands and all disbursements therefrom, said trustees shall remove each member of said committee so failing or refusing and shall select and appoint their successors. Annual audits shall be made and delivered to the trustees by a C.P.A. selected by them of all Clinic-Hospital funds and accounts.

"7. Reasonable charges for service rendered by said Clinic-Hospital shall be made to all who may avail themselves thereof and who may be financially able to pay therefor, but no needy person shall ever be denied service solely by reason of inability to pay therefor, and all payments received for such services shall be paid to the committee operating the Clinic-Hospital and shall be used by them solely for the purposes thereof."

It is quite clear that the establishment and maintenance of such clinic-hospital is not only contrary to the civil laws of Texas, but is also denounced as a crime

by our criminal laws. Medical Practice Act, Art. 4570, Vernon's Ann. Civ. Stats; Art. 739 Vernon's Penal Code; Art. 742 V.P.C.; Art. 4437, V.A.C.S.; Texas Hospital Licensing Law, Sec. 7, V.A.C.S.; The Chiropractic Act, Arts. 4567 to 4575, V.A.C.S.; Arts. 778-780, V.P.C. See also Wilson v. State Board of Naturopathic Examiners, 298 S.W. 2d 946.

The trial court further found:

> "That the validity of the clinic-hospital provisions of the trust insofar as it authorizes the acts to be performed by such clinic-hospital committee in the State of California is to be determined with reference to California law and not Texas law. That the above acts to be performed by such clinic-hospital committee would not be in violation of the laws or the public policy of the State of California, and, therefore, the Board of Trustees are authorized to carry out the clinic-hospital provisions of the Morrison Trust in the State of California as expeditiously as said Trustees may reasonably in their judgment do so."

We do not agree with this part of the judgment, and the trial court committed reversible error in so decreeing. The laws of Texas and not California should here be applied.

The trial court correctly decreed as follows:

> "(a) That the domicile of the testator, R. W. Morrison, at the time of his death was in Bexar County, Texas; that the last will of R. W. Morrison was probated in Bexar County, Texas, and his estate was administered in Bexar County, Texas; that all of the assets of the Morrison Trust are

situated and have their situs within the State of Texas, and all of the Trustees of the Morrison Trust are, and are to be, residents of the State of Texas.

"(b) That the Morrison Trust is to be continuously administered and treated as one trust, with the corpus and income handled together and treated as a single fund, and the entire net income therefrom each year, after payment of the annuities specified in said will, shall be credited on the books of the trust by the Trustees as follows: 50% to the clinic-hospitals account or fund; 25% to Baylor University, and 25% to the fund for perpetuation, preservation and maintenance of the physical properties of the trust as in said will provided; that income not distributed each year shall be invested and handled along with other funds of the trust as a single fund, as the Trustees, in the exercise of their discretion and judgment, deem in the best interest of the trust, and all income shall accrue to the benefit of the entire trust.

"(c) That it was the intention of the testator that the Trustees of the Morrison Trust at all times administer said trust within the State of Texas and not elsewhere; that the same is now being administered wholly within the State of Texas, and that the income from said trust be used for the purposes as stated and directed in said will; that the corpus of the Morrison Trust shall remain in Texas and be at all times administered by the Board of Trustees of the Morrison Trust within the State of Texas and not elsewhere, and the same will be at all times subject to the jurisdiction of the courts of the State of Texas."

There can be no question as to where the situs of the Morrison Trust is; it is in Bexar County, Texas. R. W. Morrison resided in Texas at the time of his death, the property put into the trust was located in Texas, the trustees are to continuously reside in Texas, and are to manage the Morrison Trust in Texas. Under such circumstances, the trust must be governed by the laws of Texas, and the validity of the various provisions of the will must be determined by the laws of Texas. Sec. 377, American Law Institute, Restatement of the Law of Trusts; 42 Tex. Jur. 672, § 64; 44 Tex. Jur. 773, § 206; American Law Institute, Restatement of Conflict of Laws, § 487; Stumberg, Principles of Conflict of Laws, p. 397; Page on Wills, 3rd Ed., § 164.7, Trusts; Beale, The Conflict of Laws, § 243.1; Cavers, 44 Harvard Law Review 161; Stumberg, 34 Texas Law Review; Annotations, 89 A.L.R. 1023, 139 A.L.R. 1129, and cases cited therein. Toledo Society for Crippled Children v. Hickok, 152 Texas. 578, 261 S.W. 2d 692, 43 A.L.R. 2d 553, certiorari den., 347 U.S. 936, 98 L.Ed. 1086, 74 S.Ct. 631, 115 A.L.R. 802. Laval v. Staffel, 64 Tex. 370; Holman v. Hopkins, 27 Tex. 38; Munger v. Munger, 298 S.W. 470; Albuquerque Nat. Bank v. Citizens Nat. Bank in Abilene, 212 F. 2d 943; DeVaughn v. Hutchinson, 165 U.S. 566, 17 S.Ct. 461, 41 L.Ed. 827; Jenkins v. First Nat. Bank in Dallas, 107 F. 2d 764, Fifth Circuit Court of Appeals.

The Morrison Trust is a charitable trust created under the laws of Texas, Art. 7425b-1 to Art. 7425b-47, Vernon's Ann. Civ. Stats. Art. 7425b-3 provides, among other things: "A trust in relation to, or consisting of, real, personal or mixed property may be created or established for any use or purpose which is not illegal."

Certainly the establishment and maintenance of the clinic-hospitals provided for in the will is against the public policy, the Civil Statutes and the Criminal Statutes of this State, and the fact that one of the hospitals would be established, maintained and operated in California does not change the situation. When the Texas laws are applied, and they must be applied under the above authorities, the establishing and maintaining of such a clinic-hospital is a crime wherever it may be, and it is not converted into a charity simply because it is established beyond the territorial limits of the State of Texas. Certainly we will not have Texas land and personal property administered by Texas Trustees under Texas law, and the revenue sent to another State for a purpose which is criminal under our laws, although it is not condemned as criminal in the foreign jurisdiction. For this Court to hold otherwise would be to take an untenable and inconsistent position which no court should take.

We find it unnecessary to discuss other matters herein presented, as what we have said above effectively disposes of all questions herein presented.

The will, in paragraph XII, provides as follows:

> "This trust shall never fail if for any reason it may not be operated for the exact purposes and in the exact manner herein specified, but, in either of the latter events, the trustees are authorized and directed to operate said Clinic-Hospital or Clinic-Hospitals for purposes as nearly to those specified as, in their judgment, may be done."

For obvious reasons, we do not here attempt to state what may be done by the trustees of the Morrison Trust under the provisions of that paragraph.

The judgment of the trial court is reversed insofar as it undertakes to set out the duties of the Trustees of the Morrison Trust and the members of the Clinic-Hospital Committee, and the Trustees of the Morrison Trust are instructed that in administering the trust they are to disregard the provisions of the will as to establishing and maintaining the clinic-hospitals described in the will, for the exclusive purposes set forth therein.

W. O. Murray
Chief Justice

Opinion delivered and filed November 13, 1963.

APPENDIX "B".
Last Will and Testament.

IV.

In event R. W. Morrison should be the first of us to die, it is then our will and the will of each of us that the entire residue of our joint estate be and the same is by him hereby willed upon the express trust and conditions herein set forth.

(a) Said residuary estate shall vest in a charitable, scientific and educational trust to be known and designated as the Morrison Trust. Said trust shall at all times be controlled by a board of three trustees, each of whom shall be a chairman of the board of one of the three largest national banks domiciled in San Antonio, Texas, at the time of the vesting of this trust; in event any chairman so designated decline to accept and act, then in his place the president of that bank shall be selected; in event the trustee so designated should refuse to accept or act, then the trustee or trustees designated who accept shall select a substitute trustee or trustees, each of whom shall be a chairman of the board or the president of any national bank then domiciled in San Antonio, Texas; in event of a vacancy on the Board of Trustees the remaining trustees shall select a successor trustee from a chairman of the board or president of one of the three largest national banks then domiciled in San Antonio, Texas, and if the successor so selected should refuse to accept or act, then the successor selected shall be a president of any national bank then domiciled in San Antonio, Texas. Each trustee selected as aforesaid shall be privileged to serve as trustee until he reaches the age of 75 years, unless he sooner become mentally or phys-

ically disqualified from discharging the duties of trustee. Their duties will be similar to the duties of a board of directors of an ordinary corporation, subject to the express directions herein contained, but no trustee shall ever be liable for any act done in good faith nor as result of bad judgment.

(b) Each trustee acting hereunder shall receive from the income of the trust estate as compensation for his services the sum of Two Hundred and Fifty ($250.00) Dollars per month for as long as he shall act as trustee.

(c) Title to the corpus of this trust shall vest in and the control and possession thereof shall be held by said Board of Trustees and by their successors in office for the following purposes and uses and upon the following trust and conditions, to-wit: From the net income of said trust estate the following annuities shall be distributed quarterly by said trustees to and during the lives of the respective annuitants:

1. To Miss Mary H. Mattingly, 3739 Meremac Street, St. Louis, Mo., Six Hundred ($600.00) Dollars; to Bee Morrison, Datil Catron Co., New Mexico, Nine Hundred ($900.00) Dollars; to Mrs. Julia Bradshaw, Ava, Illinois, Six Hundred ($600.00) Dollars; to Mrs. Pattie F. Dow, 240 E. Jefferson Ave., Pomona, California, Six Hundred ($600.00) Dollars to Mrs. Mary Rathman, Anacacho Ranch, Spofford, Texas, Three Hundred ($300.00) Dollars; to Willie Webb, 1736 West Ashby Place, San Antonio, Texas, Three Hundred ($300.00) Dollars; to Indalacio Silva, Anacacho Ranch, Spofford, Texas, Two Hundred and Twenty-five ($225.00) Dollars; to J. L. Custer, Anacacho Ranch, Spofford, Texas, Two Hundred Twenty-five ($225.00) Dollars; to W. R. Strickland, 2104 Alamo National

Building, San Antonio, Two Hundred and Twenty-five ($225.00) Dollars. Annuities provided for in this paragraph shall be paid solely from net income and, in event net income be insufficient during any quarter from which to pay all said annuities in full, payments shall be made pro rata, with no cumulations. The payment for each said annuitant shall lapse upon his or her death.

2. At the outset, said trustees shall determine what sum of money, in their judgment, shall be reasonably sufficient to assure for Louise L. Morrison, during the remainder of her life, quarterly payments of Thirteen Thousand ($13,000.00) Dollars and, upon their determination of said amount, they shall set the same aside from proceeds of personal property of the estate from which there shall be paid to her each quarter during the remainder of her life the full sum of Thirteen Thousand ($13,000.00) Dollars. Said payments shall be hers absolutely and to be used for her care, comfort, support and pleasure as she may wish. So long as she may live no part of said fund may be used for any other purpose than to make said payments. In event she should die before said fund be fully disbursed to her through said quarterly payments the portion of said fund then remaining shall revert to and continue as part of the corpus of the trust estate. In event said fund should become exhausted or in any manner lost prior to her death, said trustees are then directed to continue to make said payments to her so long as she may live, *first,* from income, if available, and, if not, then from the corpus of the trust estate. This provision for Louise L. Morrison is made in consideration of her desire to contribute to the creation of

this trust, which is evidenced by her joining herein and consenting to our entire residuary joint estate being disposed of by R. W. Morrison for the creation of said trust, and of her transfer and delivery to said trustees at my death, for inclusion in the corpus of the trust estate, her separate estate (except personal effects and the benefits herein provided for her).

3. After payment of said annuities twenty-five per cent (25%) of the net income annually remaining available for distribution shall be paid to Baylor University of Waco, Texas, to be used solely for establishing and maintaining a Chair at Baylor University dedicated to teaching, and which shall teach as a regular course of Baylor University, the Constitution of the United States and its interpretation by the Supreme Court of the United States during the first 125 years of its existence, *conditioned,* that Baylor University, by its Board of Directors, shall be Resolution formally accept this bequest, agreeing that taking said course shall be obligatory upon all who thereafter graduate from Baylor University. In event Baylor University refuse to accept upon, or at any time after acceptance fail to comply with, the conditions in this paragraph set forth, the provisions therein for said University shall then lapse.

4. After payment of said annuities fifty per cent (50%) of the net income annually remaining available for distribution shall be used for the establishment and maintenance and operation of one or more scientific Clinic-Hospitals which shall be directed by a committee of three, to be composed of Dr. Ben B. Burrows, who will faithfully devote his entire time and attention as directing member, and two associate members, who

may be designated by R. W. Morrison. In event he fail to designate, then said two other members shall be selected by said Board of Trustees from five names to be recommended by Dr. Burrows. Should Dr. Burrows at any time decline to further act, or become mentally or physically permanently incapacitated from acting, the Board of Trustees shall select a successor. Each directing member or committee successor must be trained in the same art and science as practiced and advocated by the said Dr. Burrows, and, in the opinion of said trustees, must be a man of high character and worthy of the position. The compensation of Dr. Burrows shall be Twenty-five Thousand Dollars ($25,000.00) per year, and the compensation of the other two members serving with him shall be Twelve Thousand Dollars ($12,000.00) per year each, all of which compensations are minimum and will be increased as hereinafter stipulated and may be increased at any time by majority vote of trustees.

5. Said Clinic-Hospitals shall be devoted exclusively to the scientific study, research and improvement of existing methods, and to the development of new methods of treating and of preventing human sickness, particularly with respect to the effects on human health of nutrition, blood chemistry, radionics and electricity, and to methods of non-medical healing, and to applying the knowledge so acquired in the treatment of human sickness.

6. Should said committee fail or refuse to operate any Clinic-Hospital herein provided for in full accordance with the directions contained herein, or to properly account for all receipts coming into their hands and all disbursements therefrom, said trustees shall remove

each member of said committee so failing or refusing and shall select and appoint their successors. Annual audits shall be made and delivered to the trustees by a C.P.A. selected by them of all Clinic-Hospital funds and accounts.

7. Reasonable charges for services rendered by said Clinic-Hospital shall be made to all who may avail themselves thereof and who may be financially able to pay therefore, but no needy person shall ever be denied service solely by reason of inability to pay therefor, and all payments received for such services shall be paid to the committee operating the Clinic-Hospital and shall be used by them solely for the purposes thereof.

8. Activities of the trust shall at all times be under the control and supervision of said Board of Trustees, but said hospital committee shall be the sole authority as to all Clinic-Hospital operations.

9. Said trust shall have, whenever deemed necessary by said trustees, a manager and a secretary, each of whose dutues shall be prescribed by the Board of Trustees. Compensation shall be paid to each on a per diem basis, with a minimum total payment for managerial services of Twelve Thousand ($12,000.00) Dollars during any twelve months, and a minimum total payment for secretarial services of Six Thousand ($6,000.00) Dollars during any twelve months. It is the will of each of us that R. W. Morrison shall have the right to designate a manager and a secretary, but in event he does not exercise that right, then said Board of Trustees shall make such selection and the ones selected shall at all times be responsible to said Board

of Trustees, which shall at all times have the right to remove any manager or secretary and to appoint a successor.

10. So long as the average income available for distribution from the St. Anthony Hotel in San Antonio, Texas, during any consecutive five-year period, equals or exceeds One Hundred Thousand ($100,000.00) Dollars per year, no sale thereof shall be made; so long as the average annual income available for distribution from the property known as the San Augustine Ranch, Inc., situated in New Mexico, during any consecutive five-year period equals or exceeds Ten Thousand ($10,000.00) Dollars, said Ranch shall not be sold; and neither the said St. Anthony Hotel nor said San Augustine Ranch shall at any time be sold, *unless* all of said trustees then constituting said Board of Trustees deem such sale to be in the interest of said trust estate. So long as the St. Anthony Hotel remains in the trust estate, either R. W. Morrison or Louise L. Morrison shall be entitled to and shall receive free hotel accommodations and service at said hotel, as he or she may desire.

11. Said trustees shall, subject only to limitations herein set out, have full control, possession and management of said trust estate, vested with full power as such trustees to hold, manage, sell, invest and exchange the corpus of the trust, but proceeds of any sale or exchange shall be forthwith placed in said corpus as part thereof to reinvest, borrow and lend monies (upon security deemed adequate to the trustees); to enforce claims by and defend claims against the trust estate; to conduct litigation and consent to arbitrations; to compromise and settle controversies in which the trust es-

tate may become involved; to demand, receive and enforce payment of all revenue and profits and income which may justly become due to said estate; to enforce and defend any and every right whatsoever to which said trust estate may be entitled; to pay from the corpus (if deemed in its interest by the trustee) reasonable costs and expenses of every character which may be incurred by said trustees in enforcing and protecting the rights and interests of said trust estate; to consent to and participate in the dissolution, consolidation, reorganization or liquidation of any corporation of which the trust may hold stocks, bonds or other securities, *but*, the property, stock, securities or cash which may result from any such dissolution, reorganization, consolidation or liquidation shall forthwith be placed in and made part of the corpus of the estate.

12. If, at the date of my death, the Manager of the San Augustine Ranch, Inc. and my Confidential Secretary, or either of them, have been in my employ continuously for as long as twelve (12) months next preceding the date of my death, their integrity, knowledge of their duties and the ability to propertly discharge them, are hereby vouchsafed by me. Should at my death the Manager of San Augustine Ranch, Inc. have been with me in said capacity as long as twlelve months next preceding my death, I direct that he be retained by the trustees, if he should so desire, and be continued in said employment as long as he may continue to satisfactorily discharge his duties to said trustees. Should at my death my Confidential Secretary have been in my employ in said capacity for at least twelve months next preceding my death, I direct the trustees to retain him as Secretary of the Trust, if he should so desire,

and to continue him in said position so long as he may satisfactorily discharge the duties thereof to the trustees.

13. All sums of money mentioned herein are intended to be adequate based on present monetary purchasing power and to obviate the possibility of their becoming inadequate through decreased monetary purchasing power, they shall be adjusted so that they will be increased measured by the yardstick of the gross room income of the St. Anthony Hotel by months during the year 1947; however, no change in such amounts shall be made unless there is an increase in gross room revenue of the St. Anthony Hotel for a continuous six months' period equal to a tleast 20% in the gross room revenue of said hotel for like months during the year 1947.

14. Any person or corporation may make contributions to the corpus of this trust by accompanying such contribution with written consent that it shall thereafter be part of the corpus of said trust and subject to all provisions herein governing the same.

15. Of the Clinic-Hospitals herein provided for, the first one consisting of accommodations for not more than 50 patients which shall be established, operated and maintained in California and at the expiration of not less than two years from the date of the establishment of this first Clinic-Hospital, if funds are available, and if in the judgment of the committee of the Clinic-Hospital it is advisable to do so, a second Clinic-Hospital having accommodations for not less than 100 patients shall be established, operated and maintained in San Antonio, Texas, provided the laws of the State

of Texas clearly permit its establishment at that time. Should the laws of the State of Texas not permit the establishment of the second unit as above provided in San Antonio, Texas, and should the laws of the State of New Mexico permit the establishment of such a Clinic-Hospital in that State, then if in the judgment of the Committee it is advisable to do so, they shall establish, operate and maintain a second Clinic-Hospital in the State of New Mexico. In the event the laws of the State of Texas clearly permit the establishment of the second Clinic-Hospital in Texas, then at the discretion of the majority of the Committee, funds being available, they may at any time thereafter establish a third Clinic-Hospital in the State of New Mexico. The compensation of the members of the Committee, including the directing member, shall be increased 50% when Clinic-Hospital No. 2 is established and a like amount when Clinic-Hospital No. 3 is established. In the event the laws of either or both the States of Texas and New Mexico do not clearly permit the establishment of Clinic-Hospitals Nos. 2 and 3, then the members of the Committee shall establish such Clinic-Hospitals in whatever States in their judgment the greatest good will be accomplished through their establishment in such states.

16. Immediately upon the vesting of the trust estate in said trustees and their taking possession thereof, they shall cause books and records to be opened (under the supervision of an established Certified Public Accountant), and shall thereafter cause the same to be continuously maintained so that they will at all times truly reflect the condition, character and status of the corpus of the trust estate and the income thereof; the

appropriation and expenditures of income; and all financial transactions affecting or pertaining to said trust estate and its operations.

17. Enumeration of powers and duties is not intended to be exclusive, but, by reason of the confidence in said trustees and their successors in office will be like resolute men of high character, ability and integrity, they are relied upon, in all actions as trustees, to maintain the corpus of said estate and to apply its income as herein directed. Said trustees shall have and exercise every power which may be fairly incidental to the free exercise by them of the powers expressly enumerated, all to be exercised by said trustees in the exercise of their honest discretion, *provided,* said trustees are enjoined to at all times bear in mind the purpose to preserve intact the corpus of the trust, or its equivalent; to apply after payment of annuities, seventy-five per cent (75%) of the net income solely to the educational, charitable and scientific purposes herein specified, divided as follows, to-wit, twenty-five per cent (25%) of maintenance of said Chair to be established and maintained upon conditions herein set forth at Baylor University, dedicated to the teaching of the Constitution of the United States and its interpretation by the Supreme Court of the United States for the first one hundred and twenty-five (125) years of its existence; fifty per cent (50%) to the establishment, operation and maintenance of Clinic-Hospitals for the purposes as herein provided; the remaining twenty-five (25%) per cent of said net income shall be used solely for perpetuation, preservation of the property of the trust estate, and replacements and improvements. The trustees are directed, in keeping with my uniform policy, to

at all times maintain the property of the estate in modern condition, which is essential to make it yield the maximum income. "Net Income" as herein used is defined to be the amount of available cash remaining from gross income to the trust estate after deducting amounts properly chargeable as (a) current operating expenses of every character; (b) maintenance and repairs; (c) taxes and insurance of every sort; (d) depreciation.

18. Should my wife survive me, my Executors are directed to pay to her Four Thousand, Three Hundred Thirty-three and 33/100 ($4,333.33) Dollars monthly during the interim between the date of my death and the date quarterly payments provided for her from the trust estate shall commence.

APPENDIX C.

Brief for Appellant.

In the Court of Civil Appeals, for the Fourth Supreme Judicial District of Texas, Sitting at San Antonio.

Will Wilson, Attorney General of the State of Texas, Et Al., Appellants, vs. Forrest M. Smith, Et Al., Appellants, vs. Forrest M. Smith, Et. Al., Appellees. No. 14148.

Appeal from the 73rd Judicial District Court of Bexar County, Texas.

To Said Honorable Court:

STATEMENT AND NATURE OF THE CASE

This suit for declaratory relief was brought by Forrest M. Smith, Ernest M. Groos, and T. C. Frost, as trustees of the Morrison Trust, created under the will of R. W. Morrison, against Ben B. Burrows, a resident of Los Angeles, California, Edmund G. Brown, Attorney General of the State of California, Will Wilson, Attorney General of the State of Texas, Fred Stanley, Attorney General of the State of New Mexico, and Baylor University, a Texas corporation.

The Petition for Declaratory Judgment seeks construction of the will of R. W. Morrison and directions thereunder.

Answers to the Petition for Declaratory Judgment were filed by said Ben B. Burrows, Edmund G. Brown, as Attorney General of the State of California, and Will Wilson, as Attorney General of the State of Texas. Baylor University filed a waiver and disclaimer of any interest in this suit.

A First Amended Original Answer was filed by defendant Will Wilson, Attorney General of the State of Texas, in which said defendant joins the plaintiffs in asking for a construction of the will of R. W. Morrison and a determination of the questions propounded in plaintiff's petition.

Trial was had on June 26, 1961 before the Honorable Eugene C. Williams, Judge of the District Court, 131st Judicial District, Bexar County, Texas.

Declaratory Judgment was signed and entered November 20, 1962. Said judgment notes that exceptions to it were taken and notices of appeal given by Will Wilson, Attorney General of the State of Texas, and Ben B. Burrows. Subsequently, a Notice of Appeal from said judgment was filed by Stanley Mosk, as Attorney General of the State of California.

INTRODUCTION

In the instant suit the trustees under the will of R. W. Morrison seek guidance of the court in carrying out their trust. Involved is the interpretation of the will and the effect of the reduction of the trust corpus that resulted from the election of Louise L. Morrison, surviving widow of R. W. Morrison, to take her share of the community estate in lieu of what was bequeathed to her in the aforesaid will.

It is our position that the lower court erred in interpreting certain provisions of the will and in modifying other provisions. In the following portion of this brief, we have set forth the portions of the Declaratory Judgment which we believe to be in error, as a matter of law, together with our reasoning and authorities. Were appropriate we have suggested what we deem proper orders.

FIRST POINT

The court erred in finding as fact:

1. "That the Board of Trustees in the exercise of their powers and duties to establish the first and subsequent clinic-hospitals may properly reduce the size of such clinic-hospitals and the salaries of the members of the clinic-hospital committee as they deem proper under all of the facts and circumstances relating to the trust, including, but not exclusive of, the reduced size of the corpus of the Morrison Trust and the income therefrom allocable to the clinic-hospital provisions thereof and consistent with prudent management of a perpetual trust, provided, however, clinic-hospital committee members' salaries shall not be inconsistent with Paragraph 12 of Section IV of this judgment.[1]

(Judgment, Sec. II, para. [d].)

2. "That the provisions for the salaries of the clinic-hospital committee is precatory and not binding on the Board of Trustees, except as provided for in Paragraph 12, Section IV, of this judgment.";

(Judgment, Sec. II, para. [e].)

and in decreeing,

1. "That the Board of Trustees, in the exercise of their powers and duties to establish the

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[1] "(12) To determine and fix the amount of salaries to be payable to such clinic-hospital committee members as the Board of Trustees, in the exercise of their sound judgment in the management of the trust and its fiscal affairs, deem it proper and advisable to pay, and to contract with the members of the clinic-hospital committee in respect to the compensation they will be paid for their services in the operation of such clinic-hospitals, provided that such salaries shall be in accordance with the Morrison Trust reduced by one-half (½)."

first and subsequent clinic-hospitals, may properly reduce the size of such clinic-hospitals and the salaries of the members of the clinic-hospital committee as they deem proper under all of the facts and circumstances relating to the trust, including, but not exclusive of, the reduced size of said trust and consistent with prudent management of the fiscal affairs of a perpetual trust, provided, however, the clinic-hospital committee members' salaries shall be consistent with Paragraph 12 of Section IV of this judgment.";
(Judgment, p. 4 [c].)

2. "The provision in the will specifying the salaries to be paid to members of the clinic-hospital committee is precatory and not binding upon the Board of Trustees, subject, however, to the provisions in (c) next above."

STATEMENT, ARGUMENT AND AUTHORITIES

In the above findings and adjudications the trial court has rewritten the decedent's will adding discretion to the trustees to reduce the size of the clinic-hospitals and the salaries of the members of the clinic-hospital committee from that specified in said will.

The clinic-hospital to be provided in California is to have accommodations for not more than 50 patients. This facility obviously was contemplated as the pilot project and, if initially established as a modest facility, should be planned to permit future expansion. It is incumbent upon the trustees and the committee to plan a reasonable facility of accommodations for up to 50 patients, calculate the initial costs of the building

and maintenance, and determine, on the basis of the trust income being earned allocable for clinic-hospital purposes, when sufficient funds are available for such project to be undertaken.

The fact that the corpus of the trust as contemplated by Mr. Morrison was reduced by some 50% does not *per se* permit the trustees to vary the size of the facilities nor the salaries clearly set forth in the will.

Considering the question of salaries first, the testator contemplated the clinic-hospital committee members would devote their full professional time to the operation of the facilities. This use of their time does not vary with the size of the California facility. Thus the facility, according to the testator, could have accommodated 10 or 50 patients, yet the salaries were not set up to vary accordingly. This of course, makes sense to us as it did to the testator. The compensation is in relation to the man's time and not the size of the facility. Nor is this error corrected by the court's changing the terms of the will, which requires the committee members to devote their full time to the clinic-hospital operations, substituting the requirement that they devote only half of their time. (See, Judgment, Sec. V, para. [f].) Moreover as a practical matter it is questionable whether the facility could feasibly operate with less than full time direction. Nothing in the will authorized this change and we respectfully submit that there is no legal sanction for it.

We recognize, of course, that changes of relevant circumstances will permit a court in exercise of its equity jurisdiction to vary the specific terms of a

trust where necessary to carry out its primary purpose. See, *Inglish v. Johnson,* 42 Tex. Civ. App. 118, 95 S.W. 558; *Jones' Unknown Heirs v. Dorchester,* 224 S.W. 596. Nevertheless, in the instant case there is merely a showing of a reduced corpus. There is no showing that the earnings of the corpus allocable for clinic-hospitals are insufficient to establish them in precisely the manner set forth by the testator. Thus, the trustees have presented no evidence of building costs and maintenance costs of any kind but merely rely on the fact of a reduced corpus. This is plainly an insufficient showing to modify the trust. The trial court was premature in permitting any deviation of the specific provisions. Until the size of the facility is decided upon and costs of establishing and operating it are computed, it is impossible for anyone to determine that reduction of the size of the facility and salaries are necessary.

At present the trustees know that a clinic-hospital may legally be established in California and may not legally be established in Texas. Only if the committee deems it advisable and the law permits, may a clinic-hospital be established in New Mexico or other states. The establishment of facilities elsewhere is a matter not passed upon by the court and not ripe for consideration. Speculation on it offers no basis for decreeing at this time that the size of the facilities contemplated and the salaries of the committee be reduced from that set forth in the will.

The finding and adjudication that the provision setting forth the salaries of committee is precatory and not binding on trustees is patently without foundation in fact or law. Certainly nothing in the will lends it-

self to such conclusion, either directly or by way of inference. On the contrary, the testator has expressly set forth minimal salaries expecting they be raised generally at the discretion of the trustees and definitely at such time as facilities, subsequent to the first, come into being. (Will, Sec. IV, para. (c)4.) The salary provision is set forth by the testator in as clear and direct a manner as the other provisions of the will which the court apparently feels are mandatory. There is nothing peculiar to a salary provision that enables it to be considered precatory though it is written in as clear and imperative language as other mandatory provisions. *Hays v. Harter,* 177 S. W. 2d 797. Rather, salary, like other specific terms of a trust may be modified where required to carry out the principal purpose of the trust. As we have stated above, no showing has been made that would justify such modification at this time.

SECOND POINT

The court erred in finding as fact:

> 1. "That it was the intention of the testator that the Morrison Trust be continuously administered as a single trust, with the corpus and the income handled together as a single fund, and the net income therefrom each year to be credited 50% to clinic-hospitals, 25% to Baylor University for the purposes stated in the will, and 25% to a fund for perpetuation and preservation of the property of the trust estate and for replacements and improvements. . . .";
>
> (Judgment, Sec. III, para. [c].)

2. "That it was the intention of the testator that the Board of Trustees each year when the net income of the trust, from whatever source, for such year is determined allocate on the books of the trust 50% to the clinic-hospitals, 25% to Baylor University, and 25% to the fund for preservation and maintenance of the physical properties of the trust; that income not distributed each year shall be invested and handled along with other funds of the trust as a single fund as the trustees, in the exercise of their discretion and judgment, deem in the best interest of the trust, and all income shall accrue to the benefit of the entire trust."; (Judgment, Sec. III, para. [e].)

and in decreeing,

1. ". . . that income not distributed each year shall be invested and handled along with other funds of the trust as a single fund, as the Trustees, in the exercise of their discretion and judgment, deem in the best interest of the trust, and all income shall accrue to the benefit of the entire trust.". (Judgment, p. 7 [b].)

STATEMENT, ARGUMENT AND AUTHORITIES

The will of the testator clearly expresses his intent that the income earned from the corpus annually be devoted to three purposes in specified percentages. Twenty-five per cent to Baylor University to establish a chair for the teaching of the United States Constitution, 50% to establish clinic-hospitals, the remaining 25% to maintain the trust corpus. Thus, each year the income re-

ceived must be so allocated. The fact that the income allocated for the clinic-hospital purpose is not expended in any year but is accumulated pending commencement of a reasonable building program does not mean that such allocated income ceases to be restricted to the clinic-hospital purpose. Therefore, earnings on funds allocated for clinic-hospital purposes likewise are impressed with the same use. This is no different than income earned from any asset impressed with a particular trust purpose. The fact that the trustees for reasons of prudent management or convenience may invest funds allocated annually for clinic-hospital purposes but not yet expended, along with other trust funds does not serve to remove the clinic-hospital purpose impressed on such accumulated funds. The earnings attributable to accumulated clinic-hospital funds so invested, partaking of the same character as the source from which they are derived, similarly are restricted in use to clinic-hospital purposes. The court then in decreeing that all undistributed funds are to be invested and handled as a single trust and all income shall accrue to the benefit of the entire trust, deprived the clinic-hospital purpose of the full value of the trust income that has been allocated to that purpose. In fact, the clinic-hospital purpose loses one-half the earnings on the trust funds annually allocated to it. Nothing in the will purports to give the trustees such a right. We respectfully submit the court lacks any legal justification for authorizing the trustees to handle the trust income in the above manner. Earnings on funds allocated to but not expended on clinic-hospitals must be restricted to clinic-hospital uses.

THIRD POINT

The court erred in finding as fact:

1. "That it was the express as well as the implied intention of the testator, R. W. Morrison, that the Board of Trustees of the Morrison Trust were to have complete and continuing control of all of the fiscal affairs of the Morrison Trust, including all fiscal affairs and fiscal policies pertaining to the clinic-hospitals.";
(Judgment, Sec. IV, para. [a].)

2. ". . . The operation of the clinic-hospitals by the clinic-hospital committee does not include the fiscal affairs or fiscal policies of the clinic-hospitals, which affairs shall always be vested in the Board of Trustees, except as directed by further orders of this court.";
(Judgment, Sec. IV, para. [b].)

3. "That included within the express and implied duties and powers of the Board of Trustees of the Morrison Trust in regard to the clinic-hospitals (except as directed by further orders of this court) are:

"To set up reserve accounts on the books of the Morrison Trust for future expenditures of the clinic-hospitals, once they are established and come into existence, and to create an operating fund to meet current expenditures with respect thereto and to establish and set up budgets covering such operations, giving due consideration to the budget first submitted by the clinic-hospital committee.

"To determine and fix the amount of salaries to be payable to such clinic-hospital com-

mittee members as the Board of Trustees, in the exercise of their sound judgment in the management of the trust and its fiscal affairs, deem it proper and advisable to pay, and to contract with the members of the clinic-hospital committee in respect to the compensation they will be paid for their services in the operation of such clinic-hospitals, provided that such salaries shall be in accordance with the Morrison Trust reduced by one-half (½).";

(Judgment, Sec. IV, para. [c] (10) (12).)

and in decreeing,

1. "That the Board of Trustees shall have every express, implied and incidental power over the management and operation of the Morrison Trust and its activities, including the clinic-hospital provisions thereof, excepting only that the members of the clinic-hospital committee shall be the sole authority as to all clinic-hospital operations, exclusive of the fiscal policies and affairs of said clinic-hospitals, the control of which are vested in the Board of Trustees.";

(Judgment, p. 10 [a].)

2. "All fiscal affairs of the Morrison Trust, including all fiscal affairs and policies of the clinic hospitals, are to be continuously handled and managed by the Board of Trustees in the exercise of siad Board's discretionary duties, and any income of or expenditures for the clinic-hospitals are to be under the direct control of the Board of Trustees, except as directed by further orders of this court."

(Judgment, p. 10 [b].)

STATEMENT, ARGUMENT AND AUTHORITIES

The difficulty with the above portions of the judgment is that in attempting to delineate between the duties of the trustees and those of the clinic-hospital committee, it reduces the function of the committee to that of mere employees of the trustees. This is contrary to the testator's expressed intention. The will provides in Section IV, paragraph (c)8, that "Activities of the Trust shall at all times be under the control and supervision of said Board of Trustees, but said hospital committee shall be the sole authority as to all Clinic-Hospital operations."

This provision, we submit contemplates and directs a division of responsibility between the board of trustees and the committee along the lines of which each group is most suited. Thus, the trustees are to manage the corpus endeavoring to obtain the maximum return, allocate income and distribute same in the percentages specified to Baylor University for the teaching of the Constitution, and to the clinic-hospital committee for the operations of the clinic-hospitals. Various duties and prerogatives enure to the trustees in managing the trust corpus, but certainly not the establishment of the fiscal policies of the clinic-hospitals, for that is a matter directly related to, and inseparable from operation of said facilities. It necessarily is within the scope of authority of the committee, whose responsibility is operation of the facilities. To remove the matters of fiscal affairs and fiscal policies from the authority of the committee is to leave their authority to operate, mere form lacking substance. Extended argument is

not required to illustrate that whoever controls the fiscal policies of the clinic-hospital, thereby controls its operations as well.

It is apparent, we submit, that whoever has the responsibility of operating the clinic-hospitals must establish the fiscal policies thereof. This does not disassociate the trustees from the clinic-hospitals. In managing the trust they will, as the trial cour thas held, determine the amount of money available annually to operate the facilities. But having done that, the precise budgeting of the funds made available by the trustees must be the function of the committee. Moreover, it is the committee, who are trained in the work and who will be on the scene, who are best qualified to do this, while the expertise of the trustees is in the field of managing the trust in a sound business-like manner.

Thus, the court erred in holding that the fiscal policies and affairs of the clinic-hospitals are within the control of the board of trustees.

This division of authority between the trustees and the committee does not result in the committee having uncontrolled discretion or being independent of the trustees. Should the committee fail or refuse to operate the facilities as directed in the will or to properly account for all receipts and disbursements, they are subject to removal by the trustees. (Will, Sec. IV, para. [c] 6.)

Moreover, the committee members are themselves secondary trustees of such funds received to operate the clinic-hospitals and as such are subject to the enforcement powers of the Attorney General of the state where each facility is situated. *Pratt v. Security Savings Bank*, 15 Cal .App. 2d 630.

In California, as in other common-law jurisdictions, it is not only the right, but the duty of the Attorney General to take appropriate action to remedy abuse of a charitable trust. *People v. Cogswell,* 113 Cal. 129; *In re L.A. County Pioneer Society,* 40 Cal. 2d 852.

In addition, California has adopted the Uniform Supervision of Trustees for Charitable Purposes Act (Govt. Code §§ 12580-12595), requiring such trustees to register and report annually the activities of the trust. This, of course, materially aids the Attorney General in carrying out his duties of charitable trust enforcement.

Therefore, all concerned may be assured that the committee, though operating in jurisdictions other than that of the situs of the trust itself, may not with impunity deviate from the trust purposes.

With regard to the authority of the trustees to fix salaries, we respectfully submit that the salaries of the members of the clinic-hospital are governed by the terms specifically set forth in the will and that no showing was made at the trial that would justify the court authorizing deviation from said terms at this time. (Reference is made to our discussion under First Point hereinabove as being applicable here as well.)

FOURTH POINT

The court erred in finding as fact:

> 1. ". . . The directing member and other members of the committee and those who shall assist the committee shall be licensed chiropractors and shall be licensed to practice chiropractic in the State of California. . . .";
>
> (Judgment, Sec. V, para. [e].)

2. "That Dr. Ben B. Burrows shall be the directing member of the hospital committee and shall devote at least one-half (½) of his time and attention to the clinic-hospial operations. The other members of the committee shall devote not less than one-half (½) of their entire time and attention to the clinic-hospital operations."; (Judgment, Sec. V, para. [f].)

3. "That the clinic-hospital operations shall be under the sole authority of the clinic-hospital committee, excluding the fiscal affairs and fiscal policies of the clinic-hospitals which shall at all times be under the control of the Board of Trustees."; (Judgment, Sec. V, para. [g].)

4. ". . . all payments received for such services shall be paid to the committee operating the clinic-hospital and shall be used solely by them for the purposes of such clinic, consistent with the fiscal policies set and established by the Board of Trustees.";
(Judgment, Sec. V, para. [h].)

5. "Should said hospital committee fail or refuse to operate any clinic-hospital in full accordance with the directions contained in the Morrison Trust and in accordance with the fiscal policies of the Board of Trustees, and to properly account for all receipts coming into their hands and all disbursements therefrom, said Trustees shall remove each member of said committee so failing or refusing and shall select and appoint their successor. . . .";
(Judgment, Sec. V, para. [i].)

6. "That the clinic-hospital committee in pursuance of the operations of the clinic-hospitals shall be authorized to employ within the fiscal policies established by the Board of Trustees subordinate personnel to aid in the operation of such clinic hospitals.";
(Judgment, Sec. V, para. [j].)

and in decreeing,

1. "That Dr. Ben B. Burrows as directing member of the clinic-hospital committee and the other two members of said committee shall devote not less than one-half (½) of their entire time and attention to the clinic-hospital operations.";
(Judgment, p. 14 [d].)

2. "That the clinic-hospital committee shall be the sole authority as to all clinic-hospital operations exclusive of fiscal policies pertaining to such clinic-hospitals, which policies shall be fixed by the Board of Trustees.";
(Judgment, p. 14 [e].)

3. ". . . Any one employed by the committee, except licensed nurses, to administer to human beings shall be a licensed choropractor who advocates and practices the same art and science as advocated and practiced by Dr. Ben B. Burrows.";
(Judgment, p. 16 [i].)

4. "That the Board of Trustees of the Morrison Trust are empowered to remove any member of the clinic-hospital committee for failing or refusing to operate the clinic-hospitals as provided for in the testator's will as herein construed and interpreted.".
(Judgment, p. 16 [1].)

STATEMENT, ARGUMENT AND AUTHORITIES

The adjudication that the trustees have unqualified discretion to fix the date upon which the salaries of committee members shall commence is improper. Salaries should commence when any substantial services are rendered. (Judgment, p. 14 [b].)

The court has reduced the time of the committee members required to be devoted to the clinic-hospital operations. This contradicts Section IV, paragraph (c)4 of the will which provides that Dr. Burrows devote his entire time and attention as directing member of the committee. It is apparent that the court reduced the time required of committee members to accord with the reduction ordered of their salaries. The latter, as we have argued above, was improper and cannot justify the instant deviation from the terms of the will.

The court has determined that those who may assist the committee shall be licensed chiropractors and shall be licensed to so practice in the State of California. While the will directs each member of the clinic-hospital committee be trained in the same art and science as Dr. Burrows, it does not purport to impose such qualification on all persons who may assist the committee. We submit further that such a restriction is unreasonable for there has been presented no showing as to why the committee may not avail itself of the assistance of anyone, who under the particular circumstances that may arise, can be helpful to the committee in carrying out the functions of the clinic-hospitals. Such restriction then is neither required by the will nor reasonable and should be deleted.

The judgment recites that the fiscal affairs and policies of the clinic-hospitals are at all times under the control of the board of trustees, and refers to the fiscal policies being established by the trustees. It states further that the trustees shall remove each committee member who fails or refuses to operate any clinic-hospital in full accordance with the fiscal policies of the board of trustees, though the will fails to reveal such ground for removal of members of the committee.

It is our position that fiscal affairs and policies of the clinic-hospitals devolve upon the operators of those facilities, the clinic-hospital committee, and not upon the trustees. Rather than burden the court with amplification, we respectfully refer to our discussion in Third Point hereinabove.

FIFTH POINT

The court erred in finding as fact:

1. "That the Board of Trustees of the Morrison Trust shall have the right, power and prerogative to accumulate income of the Morrison Trust attributable to the clinic-hospital provisions thereof until such time as they, in their sole judgment and discretion, deem sufficient funds to be available to establish, maintain and operate the first and subsequent clinic-hospitals.";
(Judgment, Sec. II, para. [c].)

2. "That included within the express and implied duties and powers of the Board of Trustees of the Morrison Trust in regard to the clinic-hospitals (except as directed by further orders of this court) are:

"To determine the amount of the clinic-hospital reserve account to be expended in the establishment of the first clinic-hospital and the amount to be expended in the establishment of any subsequent clinic-hospital.

"To determine when and how much of the income of the clinic-hospital reserve account shall be expended each year on the first clinic-hospital once it has come into existence and is operating.

"To determine when and in what manner the first and each subsequent clinic-hospital shall be established and maintained.

"To select the site of each clinic hospital after consultation with the chairman of the clinic-hospital committee and such other experts and authorities as the Trustees deem proper.

"To erect and construct clinic-hospitals and to do and perform all acts and things incident thereto.

"to lease and improve property for such purposes.

"To determine the size and character of the improvements after consultation with the chairman of the clinic-hospital committee and such other experts and authorities as the Trustees deem proper.

"To supervise the construction thereof.

"To do any and all things in bringing about the establishment and maintenance of the clinic-hospitals as they, in the exercise of their sound judgment, deem prudent under all of the facts

and circumstances relating to said trust, including, but not exclusive of, the amount of funds available for such purposes.

"To set up reserve accounts on the books of the Morrison Trust for future expenditures of the clinic-hospitals, once they are established and come into existence, and to create an operating fund to meet current expenditures with respect thereto and to establish and set up budgets covering such operations, giving due consideration to the budget first submitted by the clinic-hospital committee.

"That it was the intention of the testator that the Board of Trustees should have the broadest discretion in determining the size and character of the first clinic-hospital, and each subsequent one, within the general plan of the testator that the first clinic-hospital shall be small and any subsequent clinic-hospital shall be larger, but this discretion shall not be exercised arbitrarily, it being the purpose and intent hereof that the Trustees make such clinic-hospitals practicable and functional.

"That the provision in the testator's will for the establishment of the second clinic-hospital in not less than two years from the date of the establishment of the first clinic-hospital is precatory and not binding on the Trustees, this decision being left to the sound discretion and judgment of the Trustees after considering all facts and circumstances pertaining to this trust and, in particular, the income therefrom.";

(Judgment, Sec. IV, paras. [c] (1-10), [d], [e].)

"That the Board of Trustees shall name such clinic-hospital committee at any time before the first clinic-hospital commences to be built or operated, and shall fix the date upon which salaries of the committee members shall commence. The trustees in the establishment of the first and each subsequent clinic-hospital may consult with Dr. Ben B. Burrows or other committee members when the committee has been formed with regard to technical matters relating to such clinic-hospitals and with such other technical advisors as said Trustees deem advisable.";

(Judgment, Sec. V, para. [c].)

and in decreeing,

"That it is the right, power and prerogative of the Board of Trustees of the Morrison Trust in the exercise of their discretionary powers to accumulate income attributable to the clinic-hospital provisions of said will until such time as they, in their sole judgment and discretion, deem sufficient funds to be available to establish, maintain and operate the first and any subsequent clinic-hospitals.";

(Judgment, p. 4 [b].)

"That the Board of Trustees shall have sole authority as to all matters pertaining or incident to the establishment and maintenance of the clinic-hospitals.";

(Judgment, p. 11 [c].)

"That said Board of Trustees shall select such committee at any time they shall determine before the operation of the first clinic-hospital is com-

menced and shall fix the date upon which the salaries of committee members shall commence, and they shall, as they so elect, advise and counsel with Dr. Ben B. Burrows or other members of such committee and with anyone else whom they desire with respect to the planning and other technical aspects of such clinic-hospitals.".
(Judgment, p. 14 [b].)

STATEMENT, ARGUMENT AND AUTHORITIES

The above portions of the judgment are contrary to the specific expressions in the will that the establishment, in addition to the maintenance and operation, of the clinic-hospitals shall be directed by and shall be the primary responsibility of the committee rather than the trustees. Moreover, to foreclose the participation of the committee in the planning and establishment of the clinic-hospital is inconsistent with its practical operation by the committee. The committee is trained in the work the clinic-hospitals are to accomplish and they must be allowed to plan and establish the facilities they are to operate.

The following provisions of the will express the testator's intent that the committee be given controlling authority in establishing the clinic-hospitals. Thus, the will provides in Section IV, paragraph [c]:

> "4. . . . fifty percent (50%) of the net income annually remaining available for distribution *shall be used for the establishment and maintenance and operation of one or more scientific Clinic-Hospitals which shall be directed by a committee* of three, to be composed of Dr. Ben B. Burrows . . . and two associate members . . ."

"8. Activities of the trust shall at all times be under the control and supervision of said Board of Trustees, but *said hospital committee shall be the sole authority as to all Clinic-Hospital operations.*"

"15. Of the Clinic-Hospitals herein provided for, the first one . . . shall be established, operated and maintained in California . . . if funds are available, and if in the *judgment of the committee* of the Clinic-Hospital it is advisable to do so, a second Clinic-Hospital . . . shall be established, operated and maintained in San Antonio, Texas . . . Should the laws of the State of Texas not permit the establishment of the second unit . . . and should the laws of the State of New Mexico permit the establishment of such a Clinic-Hospital . . . then if in the *judgment of the committee* it is advisable to do so, *they shall establish, operate and maintain* a second Clinic-Hospital in the State of New Mexico. In the event the laws of the State of Texas clearly permit the establishment of the second Clinic-Hospital in Texas, then at the *discretion of the majority of the committee,* funds being available, *they may . . . establish* a third Clinic-Hospital in the State of New Mexico. . . . In the event the laws of either or both of the States of Texas and New Mexico do not clearly permit the establishment of Clinic-Hospitals Nos. 2 and 3, then *the members of the Committee shall establish such Clinic-Hospitals* in whatever States *in their judgment* the greatest good will be accomplished in such states." (Emphasis added.)

These provisions explicitly give the committee the "sole authority" to direct and operate the clinic-hospitals. Specific language used with reference to subsequent facilities, states that, ". . . the members of the committee shall *establish* such Clinic-Hospitals . . ." (Emphasis added.) Other provisions similarly indicate that if in the judgment of the committee it is advisable to do so, "they" may *establish* other clinic-hospitals. Although no one is expressly charged with establishing the initial clinic-hospital, the will indicates that the facility "shall be directed" by the committee.

These provisions of the will dealing with the creation and operation of the clinic-hospitals name only the committee, not the trustees and as noted above, the operations of the clinic-hospitals are specifically excepted from the trustee's otherwise full control and supervision of the activities of the trust. The will groups the "establishment, maintenance and operation" of the clinic-hospitals as naturally related functions. Since one function is clearly given to the committee, the manner in which the testator has related these functions in the will shows that he intended that the committee should bear prime over-all responsibility for the clinic-hospitals. No document without extensive length could set out all the various contingencies and working relationships between the committee and the trustees. However, taking all of these provisions relating to the clinic-hospitals as a whole they seem to indicate that the testator used the word "operations" of the clinic-hospitals in its broadest sense when giving the committee sole authority thereof. This is consistent with the specific reference to committee judgment and responsibility to establish subsequent clinic-hospitals and with the practical functioning of the clinic-hospitals.

The court apparently reasoned that since the trustees were given full responsibility over the financial management of the trust activities, that the trustee's control similarly extended to the planning and establishment of the clinic-hospitals. However, if the instructions of the testator set forth above are to have any practical meaning, the clinic-hospital committee must be given full authority to operate, in its broadest sense, the clinic-hospitals. At a minimum, in order for the committee to really exercise such authority, the board of trustees must immediately appoint the committee and with said committee begin to formulate plans for the construction and establishment of the clinic-hospitals. Aside from rewriting the expressed intention of the testator the portions of the judgment set forth above which give exclusive authority to the trustees to plan and establish the clinic-hospital without *requiring* them to confer and work with the committee are as objectionable as impractical. The present permissive language of the judgment regarding the need to cooperate between the trustees and the committee adds nothing to their working relationship and conceivably suggests that the trustees may ignore the determinations of the committee if the trustees choose. The successful operation of the clinic-hospital requires that its planning and establishment, as well as those of subsequent facilities, be considered primarily the function of the committee.

CONCLUSION

The testator conceived of the trust, insofar as the clinic-hospital purpose is concerned, as a mutual effort of the trustees and the committee. This, we submit, is apparent both from the language of the will and from the logic of the situation. Thus the com-

mittee must rely on the trustees in manging the trust assets, the income of which is the means for establishing and maintaining the clinic-hospitals, and the trustees must rely on the committee to establish and operate the facilities in the different states. In many things their activities will be mutual. In others there is a basic division of responsibility and, therefore, authority. Investment of trust funds, management of the trust corpus are examples of matters not within the scope of authority of the committee. Construction of the clinic-hospitals, hiring necessary personnel are matters not within the scope of authority of the trustees. Nevertheless, there is envisioned by the testator the good faith, cooperation and mutual respect of the committee and the trustees to accomplish the trust he established. Toward that end this court should set forth guides that will allow the committee and the trustees to know their respective functions and enable them to work together in harmony.

The question of changing provisions of the will regarding the trust for clinic-hospital purposes is premature. The fact of a reduced estate is by itself insufficient to warrant such changes. Other factors must first be ascertained—the size and number of facilities and their staffing, at the very least—before the effect of the reduced estate can be known. Thus it behooves the trustees and the committee to formulate plans for a building program, have cost and maintenance studies made, and consider these with projected earnings of the trust corpus available for clinic-hospital purposes. Only then can anyone determine whether or not the trust can be carried out precisely as the testator directed. We respectfully submit, the court should order such

plans be formulated, pertinent studies made, and a program for accomplishing the clinic-hospital purposes submitted to the trial court for approval.

Finally, the character of earnings on funds allocated annually for clinic-hospital purposes but not distributed is clearly that of the funds themselves. Such earnings though derived from funds invested with other trust funds enure to the benefit of the clinic-hospital purpose alone and not all the purposes of the trust.

It is therefore urged that the judgment of the lower court be reversed.

Respectfully submitted,
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on this 13th day of March, 1963.

Carl Boronkay
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APPENDIX "D".

The Chiropractic Act of California.*

An act prescribing the terms upon which licenses may be issued to practitioners of chiropractic, creating the State Board of Chiropractic Examiners and declaring its powers and duties, prescribing penalties for violation hereof, and repealing all acts and parts of acts inconsistent herewith.

The people of the State of California do enact as follows:

Section 1. A board is hereby created to be known as the "State Board of Chiropractic Examiners" hereinafter referred to as the board, which shall consist of five members, citizens of the State of California, appointed by the Governor. Each member must have pursued a resident course in a regularly incorporated chiropractic school or college, and must be a grauduate thereof and hold a diploma therefrom.

Each member of the board first appointed hereunder shall have practiced chiropractic in the State of California for a period of three years next preceding the date upon which this act takes effect, thereafter appointees shall be licentiates hereunder. No two persons shall serve simultaneously as members of said board, whose first diplomas were issued by the same school or college of chiropractic, nor shall more than two members be residents of any one county of the State. And no person connected with any chiropractic school or college shall be eligible to appointment as a member of the

*Stats. 1923, p. lxxxviii, initiative measure approved November 7, 1922, effective December 21, 1922, as amended by Stats. 1947, Ch. 151, an initiative measure submitted to and approved by the electors, pursuant to Section 1b of Article IV of the California Constitution, on November 2, 1948.

board. Each member of the board, except the secretary, shall receive a per diem of $10 for each day during which he is actually engaged in the discharge of his duties, together with his actual and necessary traveling expenses incurred in connection with the performance of the duties of his office, such per diem, traveling expenses and other incidental expenses of the board or of its members to be paid out of the funds of the board hereinafter defined and not from the State's taxes.

SEC 2. Within 60 days of the date upon which this act takes effect, the Governor shall appoint the members of the board. Of the members first appointed, one shall be appointed for a term of one year, two for two years, and two for three years. Thereafter, each appointment shall be for the term of three years, except that an appointment to fill a vacancy shall be for the unexpired term only. Each member shall serve until his successor has been appointed and qualified. The Governor may remove a member from the board after receiving sufficient proof of the inability or misconduct of said member.

SEC 3. The board shall convene within 30 days after the appointment of its members, and shall organize by the election of a president and a vice-president to be chosen from the members of the board, and a secretary, who may, but need not be a member of the board. The board shall fix the salary of the secretary, with the approval of the Director of Finance. Thereafter elections of officers shall occur annually at the January meeting of the board. A majority of the board shall constitute a quorum.

It shall require the affirmative vote of three members of said board to carry any motion or resolution, to adopt any rule, or to authorize the issuance of any license provided for in this act. The secretary shall receive a salary to be fixed by the board, together with his actual and necessary traveling expenses incurred in connection with the performance of the duties of his office, and shall give bond to the State in such sum with such sureties as the board may deem proper. He shall keep a record of the proceedings of the board, which shall at times during business hours be open to the public for inspection. He shall keep a true and accurate account of all funds received and of all expenditures incurred or authorized by the board, and on the first day of December of each year he shall file with the Governor a report of all receipts and disbursements and of the proceedings of the board for the preceding fiscal year.

SEC. 4. Powers of board. The board shall have power:

(a) To adopt a seal, which shall be affixed to all licenses issued by the board.

(b) To adopt from time to time such rules and regulations as the board may deem proper and necessary for the performance of its work, copies of such rules and regulations to be filed with the Secretary of State for public inspection.

(c) To examine applicants and to issue and revoke licenses to practice chiropractic, as herein provided.

(d) To summon witnesses and to take testimony as to matters pertaining to its duties; and each member shall have power to administer oaths and take affidavits.

(e) To do any and all things necessary or incidental to the exercise of the powers and duties herein granted or imposed.

(f) To determine minimum requirements for teachers in chiropractic schools and colleges.

(g) To approve chiropractic schools and colleges whose graduates may apply for licenses in this State. Any school meeting the requirements of Section 5 of this act and the rules and regulations adopted by the board shall be eligible for such approval.

(h) The board may employ such investigators, clerical assistants, and other employees as it may deem necessary to carry into effect the provisions of this act, and shall prescribe the duties of such employees.

SEC. 5. License to Practice: Fee: Educational Requirements. It shall be unlawful for any person to practice chiropractic in this State without a license so to do. Any person wishing to practice chiropractic in this State shall make application to the board 15 days prior to any meeting thereof, upon such form and in such manner as may be provided by the board. Each application must be accompanied by a license fee of twenty-five dollars ($25) and a certificate showing good moral character of the applicant. Except in the cases herein otherwise prescribed, each applicant shall be a graduate of an approved chiropractic school or college which teaches a course of not less than 4,000 hours, extended over a period of four school terms of at least nine months each, and shall present to the board at the time of making such application a diploma from a high school, or proof, satisfactory to the board, of education equivalent in training power to a high school course.

The schedule of minimum educational requirements to enable any person to practice chiropractic in this State is as follows, except as herein otherwise provided:

Group 1
Anatomy, including embryology and histology ....18 to 20%
Group 2
Physiology ..... 6 to 8%
Group 3
Biochemistry, inorganic and organic chemistry.... ..... 6 to 8%
Group 4
Pathology and bacteriology .....10 to 12%
Group 5
Public Health, hygiene and sanitation .... 3 to 4%
Group 6
Diagnosis, pediatrics, dermatology, syphilology and psychiatry .....12 to 18%
Group 7
Obstetrics and gynecology ..... 3 to 4%
Group 8
Principles and practice of chiropractic, physiotherapy and office procedure .....25 to 28%

Total .....83 to 100%
Electives .....17 to 0%

SEC. 6. (a) The board shall meet as a board of examiners on the first Tuesday following the second Monday of January and July of each year, and at such other times and places as may be found necessary for the performance of their duties. The office of the board shall be in the City of Sacramento. Suboffices may be established in Los Angeles and San Francisco, and such records as may be necessary may be trans-

ferred temporarily to such suboffices. Legal proceedings against the board may be instituted in any one of said three cities.

(b) Each applicant shall be designated by a number instead of the name, so that the identity will not be disclosed to the examiners until the papers are graded.

(c) All examinations shall be in writing, except in cases herein otherwise prescribed, and shall be practical in character, as taught in chiropractic schools and colleges, and designed to ascertain the fitness of the applicant to practice chiropractic. Said examinations shall be in each of the subjects as set forth in Section 5 hereof. A license shall be granted to any applicant who shall make a general average of 75 percent, and not fall below 60 percent in more than two subjects or branches of said examination. Any applicant failing to make the required grade shall be given credit for the branches passed, and may, without further costs, take the examination at the next regular examination on the subjects in which he failed. For each year of actual practice since graduation, the applicant shall be given a credit of 1 percent on the general average.

SEC. 7. One form of certificate shall be issued by the Board of Chiropractic Examiners, which said certificate shall be designated "License to practice chiropractic," which license shall authorize the holder thereof to practice chiropractic in the State of California as taught in chiropractic schools or colleges; and, also, to use all necessary mechanical, and hygienic and sanitary measures incident to the care of the body, but shall not authorize the practice of medicine, surgery, osteopathy, dentistry or optometry, nor the use of any drug or medicine now or hereafter included in materia medica.

SEC. 8. Any person who shall have practiced chiropractic for two years after graduation from a chiropractic school or college, one year of which shall have been in this State preceding the date upon which this act takes effect, or any person who graduated from a chiropratic school or college prior to January 1, 1922, and who shall present to the board satisfactory proof of good moral character and having pursued a resident course of not less than 2,000 hours in a legally incorporated chiropratic school or college, shall be given a practical and clinical examination in chiropractic philosophy and practice, and if he, or she, make a grade of 75 percent in such examination, the board shall grant a license to said applicant to practice chiropractic in this State under the provisions of this act; provided, however, that application for said license is made within six months of the date upon which this act takes effect and that each applicant shall pay to the secretary of the board the sum of $25.

SEC. 9. Notwithstanding any provision contained in any other section of this act the board, upon receipt of the fee of $25, shall issue a license to any of the following named persons:

(a) To each member of the board.

(b) To any person licensed to practice chiropractic under the laws of another state, having the same general requirements as prescribed in this act; and provided, further, that such other state in like manner grants reciprocal registration to chiropractic practioners of this State.

SEC. 10. (a) The board shall refuse to grant, or may suspend or revoke, a license to practice chiropractic

in this State upon any of the grounds, to wit: The employment of fraud or deception in applying for a license or in passing an examintaion as provided in this act; the practice of chiropractic under a false or assumed name; or the personation of another practitioner of like or different name; the conviction of a crime involving moral turpitude; habitual intemperance in the use of ardent spirits, narcotics or stimulants to such an extent as to incapacitate him for the performance of his professional duties; the advertising of any means whereby the monthly periods of women can be regulated or the mensus reestablished if suppressed; or the advertising, directly, indirectly or in substance, upon any card, sign, newspaper advertisement, or other written or printed sign or advertisement, that the holder of such license or any other person, company or association by which he or she is employed, or in whose services he or she is, will treat, cure, or attempt to treat or cure, any venereal disease, or will treat or cure, or attempt to treat or cure, any person afflicted with any sexual disease, for lost manhood, sexual weakness or sexual disorder or any disease of the sexual organs; or being employed by, or being in the service of any person, company or association so advertising. The proceedings for the refusal to grant, suspension or revocation of a license upon any of the foregoing grounds shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code as it now reads or as it may be hereafter amended by the Legislature, and the board shall have all the powers granted therein. The secretary on all cases of revocation shall enter on his register the fact of such revocation, and shall certify the fact of such revocation

under the seal of the board to the county clerk of the counties in which the certificates of the person whose certificate has been revoked is recorded; and said clerk must thereupon write upon the margin or across the face of his register of the certificate of such person the following: "This certificate was revoked on the ....day of .....," giving the day, month and year of such revocation in accordance with said certification to him by said secretary. The record of such revocation so made by said county clerk shall be prima facie evidence of the fact thereof, and of the regularity of all proceedings of said board in the matter of said revocation.

(b) At any time after two years following the revocation or cancellation of a license or registration under this section, the board may, by a majority vote, reissue said license to the person affected, restoring him to, or conferring on him all the rights and privileges granted by his original license or certificate. Any person to whom such rights have been restored shall pay to the secretary the sum of twenty-five dollars ($25) upon the issuance of a new license.

SEC. 11 (a) Every person who shall receive a license from the board shall have it recorded in the office of the county clerk of the county in which he resides, and shall have it likewise recorded in the counties into which he shall subsequently move for the purpose of practicing chiropractic.

(b) The failure or the refusal on the part of the holder of a license to have it recorded before he shall begin to practice chiropractic in this State, after having been notified by the board to do so, shall be sufficient

ground to revoke or cancel a license and to render it null and void.

(c) The county clerk of each county in this State shall keep for public inspection, in a book provided for that purpose, a complete list and description of the licenses recorded by him. When any such license shall be presented to him for record he shall stamp upon the face thereof his signed memorandum of the date when such license was presented for record.

SEC. 12. Each person practicing chiropractic within this State shall, on or before the first day of January of each year, after a license is issued to him as herein provided, pay to said board of chiropractic examiners a renewal fee of not less than two dollars ($2) nor more than ten dollars ($10) as may be set by the board. The secretary shall, on or before November 1st of each year, mail to all licensed chiropractors in this State a notice that the renewal fee will be due on or before the first day of January next following. Nothing in this act shall be construed to require the receipts to be recorded in like manner as original licenses. The failure, neglect or refusal of any person holding a license or certificate to practice under this act in the State of California to pay said annual fee during the time his or her license remains in force shall, after a period of 60 days from the first day of January of each year, ipso facto, work a forfeiture of his or her license or certificate, and it shall not be restored except upon the written application therefor and the payment to the said board of a fee of ten dollars ($10), except that such licentiate who fails, refuses or neglects to pay such annual tax within a period of 60 days after the first day of January of each year shall

not be required to submit to an examination for the reissuance of such certificate.

SEC. 13. Chiropractic licentiates shall observe and be subject to all state and municipal regulations relating to all matters pertaining to the public health, and shall sign death certificates and make reports as required by law to the proper authorities, and such reports shall be accepted by the officers of the departments to which the same are made.

SEC. 14. All moneys received by the board under this act shall be paid to the secretary of said board, who shall give a receipt for the same and shall at the end of each month report to the State Controller the total amount of money received by him on behalf of said board from all sources, and shall at the same time deposit with the State Treasurer the entire amount of such receipts, and the State Treasurer shall place the money so received in a special fund, to be known as the "State Board of Chiropractic Examiners' Fund," which fund is hereby created. Such fund shall be expended in accordance with law for all necessary and proper expenses in carrying out the provisions of this act, upon proper claims approved by said board or a finance committee thereof.

SEC. 15. Any person who shall practice or attempt to practice chiropractic, or any person who shall buy, sell or fraudulently obtain a license to practice chiropractic, whether recorded or not, or who shall use the title "chiropractor" or "D.C." or any word or title to induce, or tending to induce belief that he is engaged in the practice of chiropractic, without first complying with the provisions of this act; or any licensee under

this act who uses the word "doctor" or the prefix "Dr." without the word "chiropractor," or "D.C." immediately following his name, or the use of the letters "M.D." or the words "doctor of medicine," or the term "surgeon," or the term "physician," or the word "osteopath," or the letters "D.O." or any other letters, prefixes or suffixes, the use of which would indicate that he or she was practicing a profession for which he held no license from the State of California, or any person who shall violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $50 and not more than $200, or by imprisonment in the county jail for not less than 30 days nor more than 90 days, or both.

SEC. 16. Nothing in this act shall be construed to prohibit service in case of emergency, or the domestic administration of chiropractic, nor shall this act apply to any chiropractor from any other state or territory who is actually consulting with a licensed chiropractor in this State; provided, that such consulting chiropractor shall not open an office or appoint a place to receive patients within the limits of this State; nor shall this act be construed so as to discriminate against any particular school of chiropractic, or any other treatment; nor to regulate, prohibit or apply to any kind of treatment by prayer; nor to interfere in any way with the practice of religion. Nor shall this act apply to persons who are licensed under other acts.

SEC. 17. It shall be the duty of the several district attorneys of this State to prosecute all persons charged with the violation of any of the provisions of this act.

It shall be the duty of the secretary of the board, under the direction of the board, to aid attorneys in the enforcement of this act.

SEC. 18. Nothing herein shall be construed as repealing the "Medical Practice Act" of June 2, 1913, or any subsequent amendments thereof, except insofar as that act or said amendments may conflict with the provisions of this act as applied to persons licensed under this act, to which extent any and all acts or parts of acts in conflict herewith are hereby repealed.

SEC. 19. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portion of this act. The electors hereby declare that they would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional.